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## The Illusion of Due Process in West Virginia's Property Tax Appeals System: What Illusion?

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## THE ILLUSION OF DUE PROCESS IN WEST VIRGINIA'S PROPERTY TAX APPEALS SYSTEM: WHAT ILLUSION?

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Steven R. Broadwater\*

I.	INTRODUCTION .....	794
II.	BACKGROUND.....	797
	A. <i>Valuation Appeals</i> .....	797
	B. <i>Exoneration Case</i> .....	800
III.	THE COUNTY COMMISSION'S INHERENT CONFLICT OF INTEREST VIOLATES DUE PROCESS .....	801
	A. <i>Foster Misinterpreted the Applicable United States Supreme Court Precedents</i> .....	802
	1. A Review of the Case Law Predating <i>Foster</i> .....	802
	2. How the Majority in <i>Foster</i> Misapplied the Previous Case Law .....	807
	B. <i>The Evidence in Foster Amply Demonstrated the County Commission's Bias</i> .....	809
	C. <i>Yet the Result in Foster Turned on a Lack of Evidence</i> .....	813
	D. <i>Should the Court Have Considered the Due Process Issue in Foster?</i> .....	815
	E. <i>If the Facts Were Dispositive of the Impartial Tribunal Issue in Foster, Shouldn't They Have Been Considered in Bayer MaterialScience?</i> .....	817
	F. <i>A County Commission Simply Cannot Function as an Impartial Tribunal</i> .....	821
	G. <i>Cases Decided After Bayer MaterialScience and Foster</i> .....	822
	1. Institutional Bias.....	824
	2. Direct Pecuniary Interest .....	827
	3. The Cumulative Effect of Other Prejudicial Aspects of the Appeals Process.....	829
	H. <i>Changes to the Property Tax Appeal Process in SB 401</i> .....	831

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	1. Incremental Improvement is SB 401 .....	831
	2. Major Constitutional Issue Remaining after SB 401 .....	836
IV.	THE ISSUE OF WHETHER THE CLEAR AND CONVINCING STANDARD OF PROOF BEFORE A BOARD OF EQUALIZATION AND REVIEW VIOLATES DUE PROCESS .....	839
A.	<i>The Court had No Reason to Reach the Question of the Proper Standard of Proof in Foster</i> .....	840
	1. The Assessor in <i>Foster</i> Did Not Meet His Burden of Proof .....	841
	2. The Issue as to Whether the Clear and Convincing Standard of Proof Per Se Violates Due Process Should Have Been Addressed In <i>Bayer MaterialScience</i> , Not <i>Foster</i> .....	843
B.	<i>Existing Law on Permissible Standards of Proof</i> .....	845
	1. Supreme Court of the United States Cases on the Standard of Proof.....	845
	2. Prior West Virginia Cases on the Standard of Proof .....	847
	3. The Heightened Standard of Proof in Tax Cases .....	850
	4. West Virginia Decisions Have Been Consistent with These Apportionment Cases.....	852
	5. Two West Virginia Tax Cases Misapplied the Rule from <i>Norfolk v. North Carolina</i> .....	853
	6. <i>Concrete Pipe</i> Addresses the Issues in <i>Foster</i> and <i>Bayer MaterialScience</i> .....	854
	a. The Issue of Who Bears the Burden of Proof.....	854
	b. The Issue of the Permissible Standard of Proof.....	855
C.	<i>Problems with the West Virginia Supreme Court's Decision in Foster as to the Standard of Proof</i> .....	857
	1. In <i>Foster</i> , the West Virginia Supreme Court Again Failed to Distinguish Between the Taxpayer's Burden Before a Board of Equalization and Review and On Appeal to a Circuit Court .....	857
	2. The West Virginia Supreme Court's Use of Imprecise Language Reflects Its Confusion of the Legal Issues.....	861
	a. The West Virginia Supreme Court Failed to Distinguish Between the Burden of Persuasion and the Burden of Production .....	862
	b. The West Virginia Supreme Court Failed to Distinguish Between Which Party Bears the Burden of Proof and the Requisite Degree of Confidence That the Facts Are True.....	864
D.	<i>What Should the Court Have Done in Foster?</i> .....	870

## 2011]DUE PROCESS IN WEST VIRGINIA'S PROPERTY TAX APPEALS SYSTEM 793

	1. The Private Interest That Will Be Affected By the Official Action.....	872
	2. The Government's Interest, Including the Function Involved and the Fiscal and Administrative Burdens That the Additional or Substitute Procedural Requirement Would Entail .....	872
	3. The Risk of an Erroneous Deprivation through the Procedures Used, and the Probable Value, if Any, of Additional or Substitute Procedural Safeguards.....	874
	4. The Significance of Rules from Other States.....	875
E.	<i>In Bayer MaterialScience, the Court Failed to Address Bayer's Arguments and Evidence .....</i>	882
F.	<i>Recent Cases Affirming the Holding in Bayer MaterialScience and Foster .....</i>	886
G.	<i>Changes to the Standard of Proof in SB 401 .....</i>	888
V.	THE STANDARD OF REVIEW BEFORE A CIRCUIT COURT IN CERTIORARI.....	888
A.	<i>The Meaning of the Term "De Novo" .....</i>	890
B.	<i>Early Case Law in West Virginia on the Scope of Review ....</i>	891
	1. The Effect of the Certiorari Statutes.....	892
	2. Cases Were to be Remanded, Not Retained and Tried De Novo .....	894
	3. All Issues Fairly Raised by the Record Can Be Reviewed.....	896
	4. The Standard of Review in Proceedings in Certiorari Is Similar to That in Appeals Under the APA .....	897
	5. Inconsistent Case Law.....	902
C.	<i>Constitutional Issues: Separation of Powers.....</i>	904
	1. Review of Decisions of Administrative Agencies.....	904
	2. Review of Decisions by County Commissions for Appeals.....	908
	3. Review of Decisions by County Commissions in Certiorari .....	910
D.	<i>Shortcomings in the Supreme Court's Analysis in State ex rel. Prosecuting Attorney of Kanawha County v. Bayer Corp. ....</i>	912
	1. Exceptions to the Rule That No New Evidence Is Permitted .....	913
	2. In <i>Harrison</i> , the Supreme Court Misconstrued <i>North</i> .....	915
	3. The Supreme Court Abandoned All of <i>North's</i> Limitations.....	918
	4. The Supreme Court Ignored Bayer's Separation of Powers Argument .....	920
	5. The Supreme Court Didn't Explain Why Different Standards of Review Should Apply .....	921



E.	<i>Cases Decided After State ex rel. Prosecuting Attorney of Kanawha County v. Bayer Corp.</i> .....	924
VI.	CONCLUSION .....	928

## I. INTRODUCTION

In an exhaustive article published in the Fall 1995 edition of the *West Virginia Law Review*, Michael E. Caryl identified a multitude of due process issues with West Virginia's current procedures for administrative and judicial review of property tax assessments and proposed a broad policy-based solution to these issues.<sup>1</sup>

In its September 2008 term, the West Virginia Supreme Court of Appeals had the opportunity to address several of the most critical fairness issues. In *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*<sup>2</sup> and *Bayer MaterialScience, LLC v. State Tax Commissioner*,<sup>3</sup> taxpayers raised two of the due process issues described by Mr. Caryl: the institutional bias of the administrative tribunal that hears the taxpayer's first-level appeal of its appraisal, and the impermissibly high standard of proof the taxpayer is required to meet before that tribunal.

In the same term, in *State ex rel. Prosecuting Attorney of Kanawha County v. Bayer Corp.*,<sup>4</sup> a taxpayer objected to a circuit court's application of a low standard of review in a proceeding conducted via certiorari. There, the Circuit Court refused to pay any deference to a decision of a county commission granting relief to a taxpayer from an erroneous property tax assessment.<sup>5</sup> In a cross-assignment of error, the Kanawha County Commission objected to the Circuit Court's finding that a low standard of proof is applicable in the first-level hearing on such an exoneration request.

In all three cases, the West Virginia Supreme Court ruled against the taxpayers and in favor of the taxing authority. Confirming Mr. Caryl's observation that the court is "essentially blind to the inherent institutional bias,"<sup>6</sup> the court held that "W. Va. Code § 11-3-24 (1979) (Repl. Vol. 2008), which establishes the procedure by which a county commission sits as a board of equalization and review and decides taxpayers' challenges to their property tax assessments, is facially constitutional."<sup>7</sup>

<sup>1</sup> See Michael E. Caryl, *The Illusion of Due Process in West Virginia's Property Tax Appeals System: Making the Constitution's Promise a Reality*, 98 W. VA. L. REV. 301 (1995).

<sup>2</sup> 672 S.E.2d 150 (W. Va. 2008).

<sup>3</sup> 672 S.E.2d 174 (W. Va. 2008).

<sup>4</sup> 672 S.E.2d 282 (W. Va. 2008).

<sup>5</sup> *Id.* at 289–291.

<sup>6</sup> Caryl, *supra* note 1, at 307.

<sup>7</sup> Syl. pt. 4, *Foster*, 672 S.E.2d at 152.

The court recognized that its prior case law on the standard of proof at the first adjudicative level hearing before a board of equalization and review was inconsistent<sup>8</sup> and specifically overruled two of its prior decisions<sup>9</sup> which held that the preponderance of the evidence standard was applicable. The court held that “a taxpayer challenging an assessor’s tax assessment must prove by clear and convincing evidence that such tax assessment is erroneous.”<sup>10</sup> Dismissing the taxpayers’ claims to the contrary, it ruled that the clear and convincing standard of proof “does not violate the constitutional due process protections provided by section one of the Fourteenth Amendment to the United States Constitution or by section ten of Article III of the West Virginia Constitution.”<sup>11</sup>

On the cross assignment of error in *Bayer Corp.* as to the standard of proof in an exoneration hearing before a county commission, the court’s ruling was at least consistent with its other two decisions. The court ruled that “a taxpayer seeking relief from an erroneous tax assessment under W. Va. Code § 11-3-27 (2000) (Repl. Vol. 2008), must establish entitlement to relief by clear and convincing evidence.”<sup>12</sup> In its decision, the court cited the *Foster Foundation* case and observed that “[w]e can discern no justification for applying separate burdens of proof for assessment issues raised under W. Va. Code § 11-3-24 and assessment issues brought under W. Va. Code § 11-3-27.”<sup>13</sup>

While the court was able to discern no justification for different standards of proof in valuation appeals and exoneration cases, it was nevertheless able to do so with respect to the applicable standards of review. In *Bayer Corp.*, the taxpayer found itself in circumstances that were quite unusual. Seeking credit against future years’ taxes in the amount of taxes it overpaid, Bayer applied to the County Commission of Kanawha County for “relief from erroneous assessments” (commonly called an “exoneration”) under the provisions of section 11-3-27 of the West Virginia Code. The County Commission ruled in favor of the taxpayer, and the Prosecuting Attorney appealed that decision to the circuit court.

One might expect that in those circumstances, the taxpayer would at least have the benefit of the same high standard of review as benefits the taxing authorities have in valuation appeals—but no. The West Virginia Supreme Court ruled that “unless otherwise provided by law, the standard of review by a circuit court in a writ of *certiorari* proceeding under W. Va. Code § 53-3-3

<sup>8</sup> See Caryl, *supra* note 1, at 308 (stating that the court has “spastically oscillated between vastly disparate concepts when describing the applicable standard of proof under administrative review”).

<sup>9</sup> See *Killen v. Logan Cnty. Comm’n*, 295 S.E.2d 689 (W. Va. 1982); *E. Am. Energy Corp. v. Thorn*, S.E.2d 56 (W. Va. 1993) (per curiam).

<sup>10</sup> Syl. pt. 5, *In re Tax Assessment of Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 152 (W. Va. 2008).

<sup>11</sup> *Id.* at Syl. pt. 6.

<sup>12</sup> Syl. pt. 3, *Bayer Corp.*, 672 S.E.2d 282, 291 (W. Va. 2008).

<sup>13</sup> *Id.* at 291.

(1923) (Repl. Vol. 2000) is *de novo*.”<sup>14</sup> In other words, the circuit court was free to substitute its own conclusion on the merits of the request for exoneration for that of the tribunal charged by the legislature with the responsibility for deciding the taxpayer’s request. By contrast, in the cases in which the taxpayer disputed the assessed value of its property, the court has held that

[t]itle 110, Series 1P of the West Virginia Code of State Rules confers upon the State Tax Commissioner discretion in choosing and applying the most accurate method of appraising commercial and industrial properties. The exercise of such discretion will not be disturbed upon judicial review absent a showing of abuse of discretion.<sup>15</sup>

In either situation, the standard of review *always* favors the taxing authority.

These cases dispel any lingering illusions as to whether West Virginia’s system for resolving disputes over property tax assessments is fundamentally fair. As a result of these decisions, any taxpayer who believes that the assessed value of his property is too high must bear the significant expense of obtaining professional appraisal of his property. He will have his complaint heard by a tribunal that does not have the technical expertise to understand the technical appraisal questions before it, is severely constrained in the amount of time it has available to hear his case, has insufficient financial resources to meet all of the demands placed on it by its constituents, and will directly benefit from ruling against him. Moreover, because of the applicable high standard of proof, the tribunal can’t rule in favor of the taxpayer even if the tribunal believes that it is more likely than not that the assessment is too high.

A taxpayer’s only avenue of appeal from the inevitable adverse decision in a valuation protest is to a circuit court that can’t hear any new evidence but that can only review the undoubtedly sparse record made before the board of equalization and review, and then only if the taxpayer bore the significant expense of having a court reporter transcribe that hearing. Finally, the circuit court can’t rule in the taxpayer’s favor on the basis of that limited record absent a finding that the county commission abused its discretion—a very high standard indeed. As these cases also demonstrate, further appeal to the West Virginia Supreme Court will surely be met with a court determined not to interfere with the taxing authority’s discretion.

Mr. Caryl observed in his article that the then “unsettled posture of such fundamental issues as standard of proof, scope and standard of judicial review, while having an historical explanation, does little to provide a taxpayer-litigant, or his or her legal counsel, with the reliable guidance that is expected of a sys-

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<sup>14</sup> *Id.* at Syl. pt. 2.

<sup>15</sup> Syl. pt. 7, *Foster*, 672 S.E.2d at 152–53 (citing Syl. pt. 5, *In re Tax Assessment Against Am. Bituminous Power Partners, L.P.*, 539 S.E.2d 757 (W. Va. 2000)).

tem of laws—not of men.”<sup>16</sup> These three recent cases have now settled some of the most fundamental issues to which Mr. Caryl referred. Unfortunately, the outcome of these cases all too well demonstrates the validity of Mr. Caryl’s suggestion that judicial review by the Court is generally superficial<sup>17</sup> and confirms his prediction that the Court is unlikely to be “the principal agent of reform.”<sup>18</sup>

In the Regular Session of the Legislature in 2010, the Legislature made significant changes to the procedures for challenging the value of property assessed by the county assessors and the Tax Commissioner. The Legislature certainly had it within its power to make the system more fair, but it elected instead to protect the advantages enjoyed by the taxing authorities. While it made changes to the provisions designating the tribunal that hears appeals, it didn’t take the opportunity to eliminate the fundamental unfairness having a county commission act as the tribunal. And while it enacted new language dealing with the presumptions and burdens and standards of proof, that language was inserted only to confirm that it was making no fundamental changes to the rules established by the three cases discussed in this article. When the new provisions take effect for the assessment year beginning July 1, 2011, taxpayers will still be confronted with a system that is fundamentally biased against them.

## II. BACKGROUND

### A. *Valuation Appeals*

Bayer MaterialScience and Bayer CropScience each own and operate chemical plants in Kanawha County, West Virginia. By law, industrial property is appraised by the State Tax Commissioner.<sup>19</sup> The appraisal of industrial property such as the machinery and equipment in a chemical plant is, of course, a highly specialized technical endeavor. Traditionally, the Tax Commissioner has used the cost approach when valuing machinery and equipment. The cost approach is a means of estimating fair market value from the original cost of the equipment after accounting for inflation and all forms of depreciation. For tax year 2006, the taxpayers (herein referred to collectively as “Bayer”) found fault with only a single aspect of the Tax Commissioner’s cost approach appraisals: both taxpayers asserted that the Tax Commissioner failed to give sufficient consideration to the amount of economic obsolescence that affected their respective facilities.

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<sup>16</sup> Caryl, *supra* note 1, at 330.

<sup>17</sup> *Id.* at 336–37.

<sup>18</sup> *Id.* at 337.

<sup>19</sup> W. Va. Code § 11-1C-10(c) (2009).

The Tax Commissioner's legislative rules<sup>20</sup> require that "[i]n applying the cost approach, the Tax Commissioner *will* consider three (3) types of depreciation: physical deterioration, functional obsolescence, and economic obsolescence,"<sup>21</sup> and define economic obsolescence as "a loss in value of property arising from 'Outside Forces' such as changes in use, legislation that restricts or impairs property rights, or changes in supply and demand relationships."<sup>22</sup>

That both of Bayer's plants suffer from economic obsolescence is evident from the fact that both of the chemical plants operate at only a fraction of their full capacity, which the testimony indicated is caused by competition from other worldwide suppliers. In some instances, legacy costs unrelated to its current operations also impose a burden. Under these circumstances, unless an appropriate deduction for economic obsolescence is made in the appraisal, the plant would effectively be valued by the Tax Commissioner exactly as it would if it were operating at 100% capacity and were not subject to excessive non-operating costs. The Tax Commissioner refused to consider these factors as economic obsolescence, resulting in a substantial overvaluation of both plants.

Both taxpayers appealed the value of their industrial personal property as appraised by the State Tax Commissioner for tax year 2006 to the Kanawha County Commission sitting as the Board of Equalization and Review. Following a contentious hearing at which the President of the Commission openly declared his overriding intention to protect the county's fisc, the Board voted 2-1 to uphold the Tax Commissioner's assessment. Each taxpayer elected to pursue a separate appeal to the Circuit Court of Kanawha County. In these appeals, both taxpayers explicitly argued that the statutory process by which taxpayers can appeal excessive values violates their Due Process rights.

The circuit court rendered a final decision in the *Bayer MaterialScience* appeal<sup>23</sup> on June 28, 2006. Bayer MaterialScience filed a Petition for Appeal to the West Virginia Supreme Court of Appeals, which granted the appeal by order dated April 18, 2007.<sup>24</sup> The West Virginia Supreme Court also ordered that the briefing schedule in that appeal be held in abeyance until a Petition for Appeal was filed with the Court in the related appeal by *Bayer CropScience*.<sup>25</sup> The circuit court issued its decision in that case on October 2, 2007, and Bayer CropScience filed a Petition for Appeal from that decision for the 2006 tax year with the West Virginia Supreme Court on February 1, 2008.<sup>26</sup>

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<sup>20</sup> See W. Va. Code. R. § 110-1P-1 *et seq.* (1991) (Valuation of Commercial and Industrial Real and Personal Property for Ad Valorem Property Tax Purposes).

<sup>21</sup> *Id.* § 110-1P-2.2.11 (emphasis added).

<sup>22</sup> *Id.* § 110-1P-2.3.5.

<sup>23</sup> *Bayer MaterialScience, LLC v. State Tax Commissioner*, 672 S.E.2d 174 (W. Va. 2008).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

While Bayer MaterialScience's original appeal to the West Virginia Supreme Court was pending, Bayer filed a new round of appeals for tax year 2007 on essentially the same issues for the subsequent tax year. Again, the County Commission denied both appeals, and Bayer again appealed to the Circuit Court of Kanawha County. The circuit court consolidated those cases,<sup>27</sup> and again, by Order entered October 23, 2007, the Circuit Court affirmed the Order of the Board. Bayer filed a Petition for Appeal for the 2007 tax year with the West Virginia Supreme Court on February 11, 2008.<sup>28</sup> Bayer filed a motion to consolidate its three appeals in the West Virginia Supreme Court on February 12, 2008 (which order was granted) and filed its opening brief on May 16, 2008.

Also while Bayer MaterialScience's original appeal was held in abeyance, the Foster Foundation on January 24, 2008 appealed a decision of the Circuit Court of Cabell County upholding a determination of the Cabell County Commission sitting as the Board of Equalization and Review, which denied the Foundation's appeal of the appraised value of the Woodlands Retirement Community (Woodlands) for tax year 2007. In short, the Foster Foundation asserted that the value assigned to Woodlands did not reflect its true and actual value pursuant to West Virginia law and that the County Commission failed to account for Woodlands being a not-for-profit home for the aged. The Foster Foundation also asserted that the process by which the Cabell County Assessor's office and the County Commission arrived at the assessed value of the Woodlands violated due process of law, citing the Bayer MaterialScience appeal then pending before the West Virginia Supreme Court.<sup>29</sup> The court heard oral arguments in *Foster Foundation* and *Bayer MaterialScience* on the same day. It

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> In *In re Tax Assessment of Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 150 (W. Va. 2008), and *Bayer MaterialScience, LLC v. State Tax Commissioner*, 672 S.E.2d 174 (W. Va. 2008), the taxpayers raised and the court addressed various technical objections to their assessments. Since these technical issues are of interest only to a narrow range of taxpayers, this article does not address the court's treatment of those issues. Suffice it to say that in *Stone Brook Ltd. P'ship v. Sisinni*, 688 S.E.2d 300 (W. Va. 2009) (No. 34863), the court summarized the *Bayer MaterialScience* case as one in which the court rejected the "'taxpayers' request to apply [a] particular appraisal method where taxpayers had not provided data necessary to apply that appraisal method because taxpayers' corporate financial structure did not produce that type of data." *Id.* at 20. This description is exactly backwards, because in that case, the Tax Commissioner valued Bayer's machinery and equipment with the cost approach, yet insisted on determining the amount of economic obsolescence present with the income approach, even though Bayer couldn't provide the relevant plant-specific income data. There, it was the Tax Commissioner that insisted on using a method for which the requisite data was not available. Despite the Tax Commissioner's admission in testimony that he had "no idea" what percentage of the income he calculated for the companies as a whole was actually attributable to the specific plant and that his approach was "fairly arbitrary" and left him with "no idea" whether he had accurately determined the value of Bayer's property. See Brief of Appellant at 13, *Bayer MaterialScience, LLC v. State Tax Commissioner*, 672 S.E.2d 174 (W. Va. 2008) (No. 33881). The Court upheld the value established by the Tax Commissioner's method.

released its decision in *Foster* on November 5, 2008 and in *Bayer MaterialScience* on November 19, 2008.

### B. Exoneration Case

In *Bayer Corp.*, the taxpayer discovered errors that it made in its property tax returns for tax years 2001, 2002, and 2003.<sup>30</sup> Seeking credit against future years' taxes in the amount of taxes it overpaid, Bayer applied in August 2003 to the County Commission of Kanawha County for "relief from erroneous assessments" ("exoneration") under the provisions of section 11-3-27 of the West Virginia Code. There was no dispute that Bayer had overpaid its taxes by \$457,000 for these three years.<sup>31</sup>

Pursuant to the provisions of section 11-3-27 of the West Virginia Code, the Kanawha County Commission heard testimony and received evidence on the two issues it is charged by statute to determine: whether Bayer's request for exoneration was timely and whether the nature of the errors entitled Bayer to relief. After considering the testimony of Bayer's witnesses, the Commission, by a vote of two to one, granted Bayer's request for exoneration (considering the fact that the credit ordered by the Commission cost the county almost \$500,000, this decision could be regarded as being highly unusual, if not unprecedented).<sup>32</sup> The State Tax Commissioner, who appeared at the hearing to "defend the interests of the state, county, and districts," declined to seek review of this decision.<sup>33</sup>

Nonetheless, the Prosecuting Attorney of Kanawha County filed a petition for a writ of certiorari in the name of the State of West Virginia in the Circuit Court of Kanawha County seeking review of the Commission's decision.<sup>34</sup> By Order dated August 10, 2006, the Circuit Court ruled that it heard the matter de novo, reversed the decision of the County Commission, and ruled that Bayer was not entitled to the requested exoneration. On April 30, 2007, the Circuit Court denied Bayer's Motion for New Trial and Motion for Reconsideration. Bayer appealed that decision to the West Virginia Supreme Court of Appeals, which affirmed the decision of the Circuit Court in *Bayer Corp.* on November 5, 2008.

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<sup>30</sup> State ex rel. Prosecuting Attorney of Kanawha Cnty. v. Bayer Corp., 672 S.E.2d 282, 285 (W. Va. 2008).

<sup>31</sup> See Transcript of Oral Argument at 152–53, *Bayer MaterialScience*, 672 S.E.2d 174 (Tax Commissioner's witness admitting that Bayer pays more taxes than it should have paid had it filed correct reports and declining to dispute the amount of the discrepancies).

<sup>32</sup> *Bayer Corp.*, 672 S.E.2d at 285 (W. Va. 2008).

<sup>33</sup> *Id.*

<sup>34</sup> State's Petition for Writ of Certiorari at 1, State ex rel. Clifford v. Bayer Corp., No. 04-AA-26 (Cir. Ct. Kanawha Cnty. 2004).

### III. THE COUNTY COMMISSION'S INHERENT CONFLICT OF INTEREST VIOLATES DUE PROCESS

Quoting Professor Jerome Hellerstein, Mr. Caryl observed that

[a] fair hearing before an impartial reviewer is indispensable if the citizenry are to feel, whether they agree or disagree with the decision, that they have had a fair hearing and that the property tax system, too, effectively operates as government by law and not merely by the caprice or favoritism of the local assessor.<sup>35</sup>

In West Virginia, a taxpayer who wishes to contest the appraised value of his property for *ad valorem* property tax purposes never has the opportunity to appear before a disinterested tribunal and prove his case by a simple preponderance of the evidence. At every turn, he is confronted either by officers acting in a judiciary capacity that are inherently hostile to his interests and/or by standards of proof or review that, as a practical matter, are virtually impossible to overcome. Mr. Caryl's article focuses on the unfairness of the current system to smaller taxpayers; large industrial taxpayers are at an additional disadvantage. Since the magnitude of their claims is higher, and the negative impact on the government's fisc is correspondingly greater. For those taxpayers, the inherent institutional bias is more obvious.

In its brief to the Supreme Court of Appeals, Bayer framed this issue as follows:

In West Virginia, a county commission has the ultimate responsibility for the fiscal affairs of each county. Accordingly, a commission has an inherent interest in maximizing the revenue available to the county, and thus in denying tax appeals that would result in a reduction of revenue available to the county. This partisan interest presents a conflict with the commission's statutory role to adjudicate tax appeals. Such an inherent conflict of interest on the part of the tribunal constitutes a denial of due process to those who must appear before it.<sup>36</sup>

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<sup>35</sup> Caryl, *supra* note 1, at 360 (quoting Jerome R. Hellerstein, *Judicial Review of Property Tax Assessment*, 14 TAX L. REV. 327, 352 (1959)).

<sup>36</sup> See Brief of Appellant at 16, *Bayer MaterialScience, LLC v. State Tax Commissioner*, 672 S.E.2d 174 (W. Va. 2008).



A. *Foster Misinterpreted the Applicable United States Supreme Court Precedents*

1. A Review of the Case Law Predating *Foster*

In *Foster*, the West Virginia Supreme Court misinterpreted the relevant United States Supreme Court precedents of *Tumey v. Ohio*<sup>37</sup> and *Ward v. Village of Monroeville*.<sup>38</sup> The West Virginia Supreme Court summarized the United States Supreme Court's precedent with this language:

[w]hen faced with cases questioning the impartiality of a hearing tribunal, the United States Supreme Court generally has found a hearing tribunal to be partial when there exists a direct pecuniary interest in the outcome of the litigation.... However, when no such pecuniary interest is present, the United States Supreme Court typically has found the tribunal to satisfy the requirements of due process.<sup>39</sup>

While the first of these assertions is certainly correct, the second clearly misstates the law. While a direct pecuniary interest was present in *Tumey*, that interest was not the only factor that gave rise to the Court's finding that the tribunal was not impartial. In *Ward*, the Court found the tribunal was not impartial in the *absence* of any direct pecuniary interest.

As the West Virginia Supreme Court correctly ascertained, the Supreme Court of the United States has recognized that "officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is of course the general rule."<sup>40</sup> In its seminal decision in *Tumey*, the Court ruled that a system by which an inferior judge was paid for his service only when he convicted the defendant in a criminal proceeding violated due process requirements. The Court held that "it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case."<sup>41</sup> West Virginia has long recognized this general rule. Syllabus Point 1 in *State ex rel. Shrewsbury v. Poteet*<sup>42</sup> provides that "It is a funda-

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<sup>37</sup> 273 U.S. 510 (1927).

<sup>38</sup> 409 U.S. 57 (1972).

<sup>39</sup> *In re Tax Assessment of Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 160 (W. Va. 2008).

<sup>40</sup> *Tumey*, 273 U.S. at 522 (1927).

<sup>41</sup> *Id.* at 523.

<sup>42</sup> 202 S.E.2d 628 (W. Va. 1974).

mental rule in the administration of justice that a person can not be a judge in a cause wherein he is interested, whether he be a party to the suit or not.”<sup>43</sup>

In *Foster*, however, the West Virginia Supreme Court either missed or simply ignored the fact that direct pecuniary interests are not the only sources of potential bias which disqualify a tribunal. In *Tumey*, the impartiality of a village judge was questioned because he also was mayor of the village. As mayor and the “chief executive of the village,” he was “charged with the business of looking after the finances of the village.”<sup>44</sup> Given those duties, the Court found that the mayor could not “escape his representative capacity.”<sup>45</sup> The Court recognized that

[t]he minor penalties usually attaching to the ordinances of a village council, or to the misdemeanors in which the mayor may pronounce final judgment without a jury, do not involve any such addition to the revenue of the village as to justify the fear that the mayor would be influenced in his judicial judgment by that fact.<sup>46</sup>

However, in *Tumey*, income from the mayor’s court “offers to the village council and its officers a means of substantially adding to the income of the village to relieve it from further taxation.”<sup>47</sup>

Accordingly, the Court concluded that it was reasonable for a party to question whether he or she could receive a fair trial or sentence given the judge’s “interest as mayor in the financial condition of the village and his responsibility therefor” and his accompanying implicit “motive to help his village by conviction and a heavy fine.”<sup>48</sup> In light of the mayor-judge’s dual roles, the Court established a rule that “[a] situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law.”<sup>49</sup> The Court emphasized that “[e]very procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.”<sup>50</sup> The Court then concluded that the statutory scheme there under consideration was unconstitutional because it “vested the judicial power in one who by reason of his interest, both as an individual *and as chief executive of the village*, is disqualified to ex-

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<sup>43</sup> *Id.* at Syl. pt. 1 (quoting *Findley v. Smith*, 26 S.E. 370 (W. Va. 1896)).

<sup>44</sup> *Tumey*, 273 U.S. at 533.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 534.

<sup>47</sup> *Id.* at 533.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 533–534.

<sup>50</sup> *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

ercise it in the trial of the defendant.”<sup>51</sup> In *Tumey*, then, the combination of the mayor’s direct pecuniary interest in the outcome and his inherent bias due to the inconsistent responsibilities of his duties as judge and chief executive resulted in a denial of due process.

In *Ward*, the Supreme Court of the United States directly addressed the question of whether, *absent* a direct pecuniary interest, executive responsibilities for governmental finances *alone* was sufficient to disqualify a mayor from acting in a judicial capacity. In this case,

[t]he Mayor of Monroeville has wide executive powers and is the chief conservator of the peace. He is president of the village council, presides at all meetings, votes in case of a tie, accounts annually to the council respecting village finances, fills vacancies in village offices and has general overall supervision of village affairs. A major part of village income is derived from the fines, forfeitures, costs, and fees imposed by him in his mayor’s court.<sup>52</sup>

Over a five year period, an average of approximately 42% of the village income came from the mayor’s court.<sup>53</sup>

The Court recalled that in *Tumey*, “[t]he fact that the mayor there shared directly in the fees and costs did not define the limits of the principle”; rather,

[a]lthough “the mere union of the executive power and the judicial power in him cannot be said to violate due process of law,” the test is whether the mayor’s situation is one “which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused.”<sup>54</sup>

The Court held that

[p]lainly that ‘possible temptation’ may also exist when the mayor’s executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor’s court. This, too, is a ‘situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, (and) nec-

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<sup>51</sup> *Id.* at 535 (emphasis added).

<sup>52</sup> *Ward v. Vill. of Monroeville*, 409 U.S. 57, 58 (1972).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 60 (citations omitted).

essarily involves a lack of due process of law in the trial of defendants charged with crimes before him.”<sup>55</sup>

Even absent a direct pecuniary interest, then, the simple fact that the mayor occupied two practically and seriously inconsistent positions, one partisan and the other judicial, rendered the tribunal in *Ward* unconstitutional.

In fact, the Supreme Court of the United States has explained that “[t]he requirement of neutrality has been jealously guarded by this Court,”<sup>56</sup> and has held that even the appearance of impropriety must be avoided, observing that “justice must satisfy the appearance of justice.”<sup>57</sup> In *In re Murchison*<sup>58</sup> the Court explained:

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that ‘Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.’<sup>59</sup>

The Supreme Court of the United States has also held that these principles apply equally in civil proceedings.<sup>60</sup>

In earlier years, the West Virginia Supreme Court of Appeals recognized these due process concepts. Syllabus Point 2 of *Williams v. Brannen*<sup>61</sup> cites *Tumey* and provides that

Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to

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<sup>55</sup> *Id.*

<sup>56</sup> *Marshall v. Jerico, Inc.*, 446 U.S. 238, 242 (1980).

<sup>57</sup> *Offutt v. United States*, 348 U.S. 11, 14 (1954).

<sup>58</sup> 349 U.S. 133 (1955).

<sup>59</sup> *Id.* at 136 (citing *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

<sup>60</sup> See, e.g., *Marshall*, 446 U.S. at 242 (“The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.”); see also *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602 (1993) (holding that the requirement of an unbiased tribunal extends to situations where a private party is given statutory authority to adjudicate a dispute).

<sup>61</sup> 178 S.E. 67 (W. Va. 1935).

convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.

And in *Louk v. Haynes*,<sup>62</sup> the West Virginia Supreme Court stated:

Due process requires that the appearance of justice be satisfied. The United States Supreme Court has stated: 'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused, denies the latter due process of law.' Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'<sup>63</sup>

In other cases, the West Virginia Supreme Court of Appeals has recognized that taxpayers, in fact, do have due process rights in hearings before a board of equalization and review.<sup>64</sup> Specifically, in *In re Tax Assessments Against Pocahontas Land Co.*,<sup>65</sup> the West Virginia Supreme Court held that a county commission's failure to accord taxpayers fair procedures during valuation proceedings violates due process.<sup>66</sup> These earlier cases, however, and the

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<sup>62</sup> 223 S.E.2d 780 (W. Va. 1976).

<sup>63</sup> *Id.* at 791 (citing *Offutt v. United States*, 348 U.S. 11, 14 (1954); *In re Murchison*, 349 U.S. 133, 136 (1955)) (citations omitted).

<sup>64</sup> See, e.g., *State ex rel. Ellis v. Kelly*, 112 S.E.2d 641, 644 (1960) (holding all government branches and subdivisions "are bound by the prohibition of the due process guaranties, which extend to legislative, judicial, administrative, or executive proceedings") (citation omitted).

<sup>65</sup> 303 S.E.2d 691 (W. Va. 1983).

<sup>66</sup> *Id.* at 701-02 (lack of quorum of commission and the commission's decision given the absence of evidence contradicting the taxpayer's "claim that the assessment was made in an arbitrary fashion" violated due process); see also Syl. pt. 2. *In re E. Associated Coal Corp.*, 204 S.E.2d 71 (W. Va. 1974) ("Refusal by the county court to permit the introduction of such evidence . . . is a violation of the taxpayer's right to due process of law as required by Article III, Section 10 of the Constitution of West Virginia.").

principles upon which they were based, were entirely absent in the *Foster* decision.

## 2. How the Majority in *Foster* Misapplied the Previous Case Law

The *Tumey* and *Ward* cases were cited in the *Foster* decision for the proposition that a judge should be disqualified if he or she has a direct, personal pecuniary interest in the outcome. As demonstrated above, citing these cases as standing only for that limited proposition misses completely the fact that, in the absence of a direct, personal pecuniary interest in the outcome, a judge holding two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily denies to the litigants due process of law.

The *Foster* decision also cited *Concerned Citizens of Southern Ohio, Inc. v. Pine Creek Conservancy District*,<sup>67</sup> and *Gibson v. Berryhill*<sup>68</sup> for the proposition that a judge should be disqualified if he or she has a direct, personal pecuniary interest in the outcome. Of these, only the latter squarely addresses that point,<sup>69</sup> but that issue was not implicated in *Foster* or *Bayer Material Science* since no taxpayer asserted that the county commission has a direct, personal pecuniary interest. And in *Concerned Citizens*, the Court didn't resolve the issue of whether the tribunal was impartial; rather, as the *Foster* court recognized, it remanded the case for full consideration of the issues presented by appellants, including the issue of whether the tribunal had a financial incentive and that, therefore, persons objecting to its actions are deprived of a hearing before an impartial judicial office.<sup>70</sup>

In support of its proposition that "when no such pecuniary interest is present, the United States Supreme Court typically has found the tribunal to satisfy the requirements of due process,"<sup>71</sup> the *Foster* Court cites *Dugan v. Ohio*<sup>72</sup> and (weakly) *Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust for S. California*.<sup>73</sup> Yet the Court in *Ward* held that the situation there was "wholly unlike" that in *Dugan*, in which the mayor had "no

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<sup>67</sup> 429 U.S. 651 (1977).

<sup>68</sup> 411 U.S. 564 (1973).

<sup>69</sup> *Gibson* also stands for the proposition that if all members of the tribunal are equally infected with the same interest, the entire tribunal is disqualified. See *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 827 (1986).

<sup>70</sup> See *Concerned Citizens*, 429 U.S. at 652. On remand, the Court below never reached the issue of bias, because, following Justice Rehnquist's lead, it found that the question in that case was not an adjudicative one but a legislative one and therefore the requirement established in *Tumey* and *Ward* for an unbiased hearing officer in an adjudicative setting simply was not implicated. See *Concerned Citizens of S. Ohio, Inc. v. Pine Creek Conservancy Dist.*, 473 F. Supp. 334, 337 (1977).

<sup>71</sup> *In re Tax Assessment of Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 160 (W. Va. 2008).

<sup>72</sup> 277 U.S. 61 (1928).

<sup>73</sup> 508 U.S. 602 (1993).

*executive*, but only judicial duties.”<sup>74</sup> As the Supreme Court of the United States itself explained, *Dugan* is not applicable in *Ward* since “the Mayor’s relationship to the finances and financial policy of the city was [in that case] too remote to warrant a presumption of bias toward conviction in prosecutions before him as judge.”<sup>75</sup> Here, however, the West Virginia constitutional and statutory provisions alone as cited by the Foster Foundation reveal that a county commission exercises plainly executive functions.<sup>76</sup>

Nor should *Concrete Pipe* be cited for what the outcome should be when no direct, pecuniary interest is present. There, the Supreme Court of the United States found that trustees of a retirement fund who were required to act in a fiduciary capacity with respect the beneficiaries (retirees) of the trust were potentially biased when they were required to determine the extent of the liability of an employer who withdrew from the fund.<sup>77</sup> In that case, the potential bias of the trustees did not result in a denial of due process, but only (as the West Virginia Supreme Court failed to recognize) because the court found that the trustees acted in a prosecutorial rather than in a judicial or quasi-judicial capacity. The trustees were “not required to hold a hearing, to examine witnesses, or to adjudicate the disputes of contending parties on matters of fact or law.”<sup>78</sup> However, in the *Bayer MaterialScience* and *Foster* cases, there is no question that the Board acts in a judicial or quasi-judicial capacity, as it performed all of those functions. Thus, *Concrete Pipe* does not support the *Foster* Court’s assertion that “when no such pecuniary interest is present, the United States Supreme Court typically has found the tribunal to satisfy the requirements of due process.”

It should not have been difficult to synthesize the holdings of the cases cited by the court in *Foster* into a coherent rule. If the judge of a tribunal acting

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<sup>74</sup> *Dugan v. Ohio*, 277 U.S. 61, 65 (1928) (emphasis added).

<sup>75</sup> *Ward v. Vill. of Monroeville*, 409 U.S. 57, 60–61 (1972).

<sup>76</sup> See *infra* Part III.B.

<sup>77</sup> The Court explained:

The trustees could act in a biased fashion for several reasons. The most obvious would be in attempting to maximize assets available for the beneficiaries of the trust by making findings to enhance withdrawal liability. The next would not be so selfless, for if existing underfunding was the consequence of prior decisions of the trustees, those decisions could, if not offset, leave the trustees open to personal liability. A risk of bias may also inhere in the mere fact that, fiduciary obligations aside, the trustees are appointed by the unions and by employers. Union trustees may be thought to have incentives, unrelated to the question of withdrawal, to impose greater rather than lesser withdrawal liability. Employer trustees may be responsive to concerns of those employers who continue to contribute, whose future burdens may be reduced by high withdrawal liability, and whose competitive position may be enhanced to boot.

*Concrete Pipe*, 508 U.S. at 617.

<sup>78</sup> *Id.* at 619.

in a judicial or quasi-judicial capacity has a direct, personal pecuniary interest in the outcome of the case, the judge is disqualified. However, if the tribunal acts in prosecutorial rather than in a judicial or quasi-judicial capacity or performs legislative as opposed to executive functions, no due process issue arises. However, when an official occupies two practically and seriously inconsistent positions, one partisan and the other judicial, and when the situation is one which would offer a possible temptation to the average man as a judge to forget the burden of proof or which might lead him not to hold the balance nice, clear, and true, a denial of due process results. This is true whether or not the judge also has a direct, personal pecuniary interest in the outcome of the case. Yet somehow this relatively straightforward analysis eluded the West Virginia Supreme Court.

*B. The Evidence in Foster Amply Demonstrated the County Commission's Bias*

Having conducted its analysis of the relevant (and irrelevant) cases from the Supreme Court of the United States and having (incorrectly) concluded that only a direct pecuniary interest could disqualify the Board, the court in *Foster* then found that the Board members had no direct pecuniary interest because the individual commissioners did not directly benefit from the additional funds their decision generated and because their compensation was not affected by their decisions, and because the County Commission itself did not directly benefit from the additional revenue.<sup>79</sup>

Neither the Foster Foundation nor Bayer have any reason to complain about that finding, since neither argued that any member of the Board had direct, pecuniary interest in the form of additional compensation or otherwise. The real question before the West Virginia Supreme Court, however, was whether the members of the Board occupy two practically and seriously inconsistent positions, one partisan and the other judicial, and whether the situation is one which would offer a possible temptation for the average man as a judge to forget the burden of proof or which might lead him not to hold the balance nice, clear, and true. Although the West Virginia Supreme Court paid some slight lip service to this issue, stating that "the Foundation has not proved the Cabell County Commissioners' partiality or that their dual role as members of the Board of Equalization and Review was compromised by this alleged divided loyalty,"<sup>80</sup> all of its reasoning was directed to the question of whether the Commissioners had a direct pecuniary interest in the outcome of the case.

There should not have been any confusion as to the basis of the Foster Foundation's complaint. In fact, the Foster Foundation was quite specific; as

<sup>79</sup> See *infra* Part III.C. for a more detailed discussion of the court's findings as to the insufficiency of the evidence introduced by the Foster Foundation.

<sup>80</sup> *In re Tax Assessment of Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 160 (W. Va. 2008) (emphasis added).



the Court recognized, it cited specific constitutional and statutory provisions that establish the County Commission's responsibility for administering the fiscal affairs of Cabell County and the tax revenue at issue provides the funding for such fiscal affairs<sup>81</sup> and detailed the amount (approximately \$200,000 annually) by which the tax base for the county and its levying bodies would be reduced by a decision in favor of the taxpayers in this case.<sup>82</sup>

Under the West Virginia Constitution, County Commissioners "have the superintendence and administration of the internal police and fiscal affairs of their counties."<sup>83</sup> By statute, county commissions have the duty "to supervise the general management of the fiscal affairs and business of each county," clearly an executive function.<sup>84</sup> Moreover, the executive role of the county commissions (formerly called county courts) has long been recognized by the Supreme Court of Appeals of West Virginia, which has stated that

[c]ounty courts are the central governing body of the county. The constitution and laws of this State have committed to county courts certain legislative, executive and judicial powers directly connected with the local affairs of the county. Included among its powers, county courts ". . . have the superintendence and administration of the internal police *and fiscal affairs* of their counties . . ."<sup>85</sup>

Nor is there any question that property taxes make up the vast majority of a county commission's budget. The Court has recognized that "[t]he *ad valorem* tax is the most fundamental tax imposed upon the citizens of this State to

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<sup>81</sup> *Id.* at 157 (citing W. VA. CONST. art. IX, § 11 (establishing duty of county commissions over county's fiscal affairs); *see also* W. VA. CODE § 7-1-5 (2009)).

<sup>82</sup> In its decision, the Court recited the allegations of the appellant, including the fact that [t]he County Commission's interest in maximizing revenue is at odds with granting reductions in the assessment values of real property (regardless of validity of claims) *because it would directly result in a reduction of the tax base. For example, the Foster Foundation believes its assessment was excessive by approximately \$14,859,000. Had the Foster Foundation been successful before the County Commission, the County's tax base would have been reduced by approximately \$200,000 annually.* In every contested valuation there is an inherent conflict between the County Commission's inconsistent roles as the overseer of the county finances and as the tribunal for hearing individual tax appeals. This conflict is magnified as the amount in controversy increases.

*Foster*, 672 S.E.2d, at 159 (citing Brief of Appellant at 9–10 (emphasis added)).

<sup>83</sup> W. VA. CONST. art. IX, § 11.

<sup>84</sup> W. VA. CODE § 7-1-5 (2010).

<sup>85</sup> *State ex rel. Dingess v. Scaggs*, 195 S.E.2d 724, 725 (W. Va. 1973) (emphasis added, citations omitted) (citing W. VA. CODE §§ 7-1-1 to -9 and § 7-1-3); *see also* *Butler v. Tucker*, 416 S.E.2d 262, 267 (W. Va. 1992).

fund local government, including schools.”<sup>86</sup> Further, a substantial portion of the budget which the County Commission oversees and manages is generated from property taxes.<sup>87</sup> When revenues from property taxes fall, the County Commission must make budget cuts and other sacrifices that directly affect its constituents.<sup>88</sup>

As Justice Neely observed in his dissent in *Rawl Sales & Processing Co. v. County Commission of Mingo County*,<sup>89</sup> a county commission that is responsible for the operating budget of a county is inherently biased against taxpayers appealing their assessments. This bias is particularly applicable to large corporate taxpayers that can't vote:

... the county commission lacks expertise in property evaluation but is extraordinarily knowledgeable about the government's need for money, an *ingrained bias* that is particularly harmful to non-voting entities. Although someone should review the assessor's property evaluation, assigning this important review to the county commission is perhaps not a scheme whose design would prompt nomination for the Nobel Prize in jurisprudence. Indeed, a hearing before a county commission on a tax appeal is probably best described by the old Jewish expression:

”יִפְּוֹן דִּיין מויל עין גוזז אויטער.”<sup>90</sup>

Justice Neely also observed in his dissent in *Killen v. Logan County Commission*<sup>91</sup> that “[t]he pressures on the county commissions are probably

<sup>86</sup> See *State ex rel. Ayers v. Cline*, 342 S.E.2d 89, 94 (W. Va. 1985) (noting that property taxes were a principal source of revenue for local governments); *State ex rel. Cnty. Comm'n v. Cooke*, 475 S.E.2d 483, 491 (W. Va. 1996).

<sup>87</sup> See, e.g., *Cooke*, 475 S.E.2d at 491.

<sup>88</sup> See *State ex rel. Lambert v. Cortellessi*, 386 S.E.2d 640, 642 n.2 (W. Va. 1989). Indeed, adequate funding for the counties of West Virginia and the effective use of such funding are frequent campaign issues. See, e.g., *Meet the Candidates: Primary Election; Putnam County Commission*, CHARLESTON GAZETTE & DAILY MAIL, Apr. 20, 2008 at 13J (reporting agreement among county commission candidates that Putnam County's greatest issue was to find and provide “adequate funding” in the county); Janet Metzner, *Mon Commission Candidates Square Off*, DOMINION POST, Oct. 5, 2006 at 2-B (noting one candidate for county commissioner explained that one of his core accomplishments was the funding which the county was able to provide its fire departments); Dawn Miller, *It's tough to be Kanawha County*, CHARLESTON GAZETTE, Sept. 7, 2007, at 4A (discussing residents' competing interests, expressed “through their elected representatives,” in funding various initiatives in the county).

<sup>89</sup> 443 S.E.2d 595 (W. Va. 1994).

<sup>90</sup> *Id.* at 601 (emphasis added). The literal translation is “From your mouth to God's ear.” Loosely translated from Yiddish, this expression means that you should say it should happen and God should hear it and make it true, *but that never happens*.

<sup>91</sup> 295 S.E.2d 689 (W. Va. 1982).

such that they will quickly use all money available to them.”<sup>92</sup> The responsibility of the commissioners for the fiscal affairs of the county, together with the large percentage of the county’s budget made up by property taxes, clearly creates an inherent conflict of interest and obliterates the appearance of justice.

The West Virginia Supreme Court also recited the Commission’s response in *Foster* asserting that only a small fraction of taxpayers whose assessments increased bothered to appeal their increases and that for the subset of those who did appear for a hearing, all of the appeals were either resolved or the assessments (including the Foster Foundation’s) were reduced.<sup>93</sup> Of course, the Commission’s response cuts both ways. The Foster Foundation was complaining that the process by which taxpayers must appeal assessments that they believe are excessive is inherently unfair because the tribunal (the County Commission) is biased against them. If that’s true, it’s hardly surprising that most taxpayers recognize the futility in appealing in the first place. It’s even more true when the taxpayer is required to go to the expense of presenting testimony from a licensed appraiser or other expert to meet his or her standard of proof<sup>94</sup>—why pay for an appraisal when one is certain to lose? The fact that only twenty-one taxpayers out of 27,000 who received increased assessments, and the fact that some of these twenty-one didn’t appear for a hearing, is at least equally likely to be an indication of the inherent unfairness of the system as it is to be indication that the current system is generally perceived as fair.

Amazingly, the West Virginia Supreme Court also recognized that the Commission conceded that there “might appear” to be a conflict of interest and that it does, in fact, receive a portion of every dollar in increased tax revenue that it generates from its decisions on taxpayers’ appeals.<sup>95</sup> How can the Su-

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<sup>92</sup> *Id.* at 712.

<sup>93</sup> The Court recognized that the Commission argued:

The Commission responds that the appeals procedure does not create a conflict of interest and does not unconstitutionally deny appealing taxpayers due process of law. With regard to the tax year in issue in this case, 2007, the Commission asserts that, in Cabell County, over 27,000 pieces of property had increased assessment values; of those, only twenty-one property owners requested a hearing on their assessments, and all except one of those property owners either had their dispute resolved, did not appear for the hearing, or received a lower assessment. The Woodlands received a lower tax assessment.

*In re Tax Assessment of Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 157 (W. Va. 2008).

<sup>94</sup> See discussion of the standard of proof before the Board *infra* Part III.

<sup>95</sup> The Commission also argued:

Although the Commission concedes that there might appear to be a conflict of interest, the pecuniary interest of the Commission in tax revenues is slight: for every one dollar in ad valorem tax revenue, the County Commission receives sixteen cents while the Cabell County Board of Education receives sixty-seven cents. Thus, argues the Commission, it has no real incentive to artificially inflate tax assessments.

*Id.* at 157–158.

preme Court be blind to a conflict that even the Commission itself recognizes? The County Commission's admission that it does, in fact, get the benefit of being able to spend 16% of every dollar in tax revenue that their decisions generate is proof of the very conflict of which the Foster Foundation complained. The fact that the school board receives 67% of every dollar in tax revenue, or that other levying bodies also receive smaller direct benefits, doesn't prevent the individual Commissioners from taking credit for the additional revenue their decisions generate in their reelection campaigns. Finally, the fact that the Foster Foundation and other taxpayers received reductions in their assessments as a result of their appeals indicates that the assessor does make errors and that, even under the current unfair system, some of these errors get corrected. How many more errors would be corrected, and how much more fair would taxation be, in a fair system for taxpayer appeals?

C. *Yet the Result in Foster Turned on a Lack of Evidence*

The West Virginia Supreme Court noted that "the Foster Foundation does not argue that W. Va. Code § 11-3-24 is unconstitutional as applied; rather, the Foundation argues only that this statute is unconstitutional, which questions the statute's facial constitutionality" and that a statute that establishes the procedure that taxpayers must follow to contest their assessed taxes must be construed in favor of the government.<sup>96</sup> Nevertheless, the court stated that a taxpayer can overcome this presumption and establish the statute is unconstitutional if he meets his burden of proof to "establish that a taxing statute, valid on its face, is so unreasonable or arbitrary as to amount to a denial of due process of law when applied in a particular case, the taxpayer must prove by clear and cogent evidence facts establishing unreasonableness or arbitrariness."<sup>97</sup> The ma-

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<sup>96</sup> *Id.* at 159.

<sup>97</sup> *Id.* at 158-59. (footnote omitted) (citing Schmehl v. Helton, 662 S.E.2d 697 (W. Va. 2008)). The Court's analysis is somewhat muddled here, too. The traditional test for whether a statute is facially constitutional has been articulated by the United States Supreme Court:

Petitioners are challenging the facial validity of the regulations. Thus, we are concerned only with the question whether, on their face, the regulations are both authorized by the Act and can be construed in such a manner that they can be applied to a set of individuals without infringing upon constitutionally protected rights. Petitioners face a heavy burden in seeking to have the regulations invalidated as facially unconstitutional.

Rust v. Sullivan, 500 U.S. 173, 183 (1991) (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)). The West Virginia Supreme Court of Appeals has applied this standard:

... a facial challenge to the constitutionality of legislation is the most difficult challenge to mount successfully. The challenger must establish that no set of circumstances exists under which the legislation would be valid; the fact that the legislation might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.

majority opinion then repeatedly cited a lack of evidence as to the statute's unconstitutionality as a basis for overruling the Foster Foundation's claims.

The Court noted that

the Foundation argues that W. Va. Code § 11-3-24 is unconstitutional because the County Commission, sitting as the Board of Equalization and Review, is an impartial tribunal to hear taxpayers' appeals insofar as the Commission is the entity responsible for administering the fiscal affairs of Cabell County and the tax revenue at issue provides the funding for such fiscal affairs,<sup>98</sup>

but then found that "[a]lthough the Foundation makes this assertion, *it does not offer specific proof of the Commission's, or the Commissioners', partiality.*"<sup>99</sup> Rather, the Foundation contends generally that "[t]he County Commission has an impermissible conflict of interest in serving as both a decision maker on the Foster Foundation's appeal of an excessive tax assessment and a beneficiary of an increased tax revenue resulting from a higher assessed value of Woodlands' *without providing factual support therefore.*"<sup>100</sup> The West Virginia Supreme Court recognized that the Foster Foundation argued that "its assessment was excessive by approximately \$14,859,000. Had the Foster Foundation been successful before the County Commission, the County's tax base would have been reduced by approximately \$200,000 annually,"<sup>101</sup> but concluded that "[i]n making these assertions, though, *the Foundation does not present any specific evidence to suggest how the county commissioners, themselves, directly benefited*

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Randall v. Fairmont City Police Dept., 412 S.E.2d 737, 746 (W. Va. 1991); *see also* Lewis v. Canaan Valley Resorts, Inc., 408 S.E.2d 634, 641 (W. Va. 1991); Tony P. Sellitti Constr. Co. v. Caryl, 408 S.E.2d 336, 344 (W. Va. 1991).

In addition, a statute that is valid on its face may also be unconstitutional when applied to a specific set of facts. The standard cited and applied by the Court in *Foster* actually applies in this type of analysis:

'To establish that a taxing statute, *valid on its face*, is so unreasonable or arbitrary as to amount to a denial of due process of law *when applied in a particular case*, the taxpayer must prove by clear and cogent evidence facts establishing unreasonableness or arbitrariness.' Point 4, Syllabus, *Norfolk and Western Railway Company v. Field*, 143 W.Va. 219 [ 100 S.E.2d 796 (1957) ]." Syllabus Point 2, *State ex rel. Haden v. Calco Awning [ & Window Corp.]*, 153 W.Va. 524, 170 S.E.2d 362 (1969).

*In re Tax Assessment of Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 159 (citing Syl. pt. 1, *Schmehl v. Helton*, 662 S.E.2d 697 (2008) (footnote omitted)).

<sup>98</sup> *Foster*, 672 S.E.2d at 159 (citing W. VA. CONST. art. IX, § 11 (establishing duty of county commissions over county's fiscal affairs); W. VA. CODE § 7-1-5).

<sup>99</sup> *Id.* (emphasis added).

<sup>100</sup> *Id.* (emphasis added).

<sup>101</sup> *Id.*

from these funds or to indicate the commissioners had a direct, pecuniary interest in such revenue.”<sup>102</sup> Finally, the Court’s ultimate holding on the issue of the biased tribunal turned entirely on the lack of evidence:

. . . having reviewed the statute at issue herein and the parties' arguments regarding its constitutionality, we conclude that W. Va.Code § 11-3-24 is valid on its face. Accordingly, we hold that W. Va.Code § 11-3-24 (1979) (Repl.Vol.2008), which establishes the procedure by which a county commission sits as a board of equalization and review and decides taxpayers' challenges to their property tax assessments, is facially constitutional. Therefore, *because the Foundation has not presented evidence to prove that it was denied due process* when the Commission sat as the Board of Equalization and Review to hear and decide its appeal of the Woodlands property's tax assessment, the Foundation has not sustained its burden of proving that W. Va. Code § 11-3-24 is unconstitutional.<sup>103</sup>

*D. Should the Court Have Considered the Due Process Issue in Foster?*

It is important to realize that the Foster Foundation did not raise the issue of whether the tribunal was impartial until it filed its Petition for Appeal in the West Virginia Supreme Court of Appeals, in which it simply echoed the due process claims Bayer raised in its first appeal.<sup>104</sup> In fact, the first issue discussed by the West Virginia Supreme Court in *Foster* was whether it was necessary or appropriate to address any due process issues at all, since they had not been raised in the circuit court proceedings below and had not been ruled upon by the lower court.<sup>105</sup> This was hardly a trivial issue; on three previous occasions,<sup>106</sup>

<sup>102</sup> *Id.* (emphasis added).

<sup>103</sup> *Id.* at 160 (emphasis added). The Court’s confusion as to the correct standard to apply didn’t really matter; if the taxpayer didn’t introduce clear and convincing evidence to prove that the statute was unconstitutional is a particular set of circumstances, it certainly wouldn’t be able to prove that no set of circumstances exists under which the legislation would be valid.

<sup>104</sup> The Foster Foundation’s Petition for Appeal stated:

On or about April 18, 2007, the Supreme Court of Appeals entered an Order granting Bayer MaterialScience, LLC’s (“Bayer”) Petition for Appeal (Appeal No. 062955). In its Petition, Bayer argued, *inter alia*, that 1) the various County Commissions have an inherent conflict of interest in considering appeals from tax assessments which violates due process; 2) that the clear and convincing evidence standard imposed on taxpayers also violates due process; and 3) that the appraised value of Bayer’s applicable industrial property was excessive.

Petition for Appeal at 15, *In re Tax Assessment of Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150 (W. Va. 2008) (No. 07-C-214).

<sup>105</sup> Interestingly, the *Foster* Respondents didn’t raise this issue in their briefs; the Supreme Court nevertheless apparently felt it necessary to explain why it decided to address the issue.

taxpayers attempted to raise this due process issue in appeals to the West Virginia Supreme Court without first raising the issue in the circuit court below. In *all three* of those cases, the West Virginia Supreme Court refused to consider the issue “since it was not raised below and is a nonjurisdictional question.”<sup>107</sup>

In its determination to hear and decide *Foster*, however, the West Virginia Supreme Court decided to consider the constitutional issue despite the fact that the circuit court had not had the opportunity to address it. The majority opinion cited *Louk v. Cormier*<sup>108</sup> as authority for its decision to plow ahead.<sup>109</sup> In *Louk v. Cormier*, the court reiterated the general rule that “when nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal.”<sup>110</sup> *Louk* did, however, recognize that the general rule is not a jurisdictional prerequisite to an appeal but, rather, is a gatekeeper provision ... embodying appellate respect for the circuit court's advantage and capability to adjudicate the rights of our citizens.<sup>111</sup> Thus, under extraordinary circumstances, the West Virginia Supreme Court will consider an issue for the first time on appeal.<sup>112</sup> Those extraordinary circumstances include a case in which the court is confronted with “very limited and essentially undisputed facts”<sup>113</sup> and in which “by neglecting to raise an issue in a timely manner, a litigant has [not] deprived this Court of useful factfinding.”<sup>114</sup> The case must also be one raising an issue of constitutional magnitude<sup>115</sup> of substantial public interest which may recur in the future.<sup>116</sup>

<sup>106</sup> See *Keith v. Gerber*, 197 S.E.2d 310, 311–12 (W. Va. 1973); *In re Tax Assessments Against Pocahontas Land Corp.*, 210 S.E.2d 641, 648 (W. Va. 1974); *In re Tax Assessments Against Pocahontas Land Corp.*, 303 S.E.2d 691, 701 n.13 (W. Va. 1983).

<sup>107</sup> *In re Tax Assessments Against Pocahontas Land Corp.*, 303 S.E.2d at 701 n.13 (citing *Wells v. Roberts*, 280 S.E.2d 266 (W. Va. 1981)); *Boury v. Hamm*, 190 S.E.2d 13 (W. Va. 1972).

<sup>108</sup> 622 S.E.2d 788 (W. Va. 2005).

<sup>109</sup> The Court stated:

[W]e nevertheless may consider [the issue of whether it is a denial of due process for the taxpayer's appeal to be heard by a body that was not impartial] for the first time on appeal to this Court insofar as it raises an issue of constitutionality that is central to our disposition of this case.

*In re Tax Assessment of Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 159 (W. Va. 2008) (quoting Syl. pt. 2 *Cormier*, 622 S.E.2d at 788 (“A constitutional issue that was not properly preserved at the trial court level may, in the discretion of this Court, be addressed on appeal when the constitutional issue is the controlling issue in the resolution of the case.”)).

<sup>110</sup> *Cormier*, 622 S.E.2d at 793–94 (quoting *Whitlow v. Bd. of Educ. of Kanawha Cnty.*, 438 S.E.2d 15, 18 (W. Va. 1993)).

<sup>111</sup> *Id.* at 793 (quoting *State v. Greene*, 473 S.E.2d 921, 926–27 (W. Va. 1996) (Cleckley, J., concurring)).

<sup>112</sup> *Id.* (emphasis added and footnotes omitted).

<sup>113</sup> *Id.* (citing *Whitlow*, 438 S.E.2d at 18–19).

<sup>114</sup> *Louk v. Cormier*, 622 S.E.2d 788, 793–94 (W. Va. 2008) (citing *Greene*, 473 S.E.2d at 926–27).

<sup>115</sup> *Id.*

Should the West Virginia Supreme Court in *Foster* have decided to depart from its general rule, despite having adhered to the general rule in three previous cases raising exactly the same issue? Certainly, the issues addressed in *Foster* were of constitutional magnitude of substantial public interest which will recur in the future. Just as certainly, however, the court in *Foster* was deprived of useful factfinding; in fact, the court based its decision on the constitutional issues solely on its determination that the Foster Foundation failed to introduce sufficient evidence to prove that the process for hearing challenges to the assessed value of a taxpayer's property was unconstitutional. Given the court's demand for evidence of specific unfairness, the *Foster* case was hardly one that "lends itself to satisfactory resolution on the existing record without further development of the facts." By the criteria established in *State v. Greene* and specifically adopted by the court in *Cormier*, the *Foster* case was not one in which the court should have departed from its general rule.

Ironically, in *In re: Charleston Gazette FOIA Request*,<sup>117</sup> decided less than a month after *Bayer MaterialScience* and *Foster*, the West Virginia Supreme Court again agreed to consider a question the lower court has not addressed. There, however, it did so specifically because:

Given the specific facts of this case [including "the enormous amount of time that has passed since the July 6, 2007, FOIA request"], we find the Gazette's argument compelling and believe that sending this case back to the circuit court without guidance on the issue of public employee payroll records would create substantial prejudice, would cause further delay, and would more than likely result in the case returning to this Court again under the same set of facts.<sup>118</sup>

The West Virginia Supreme Court's decision in *In Re: Charleston Gazette FOIA Request*, then, seems consistent with the Court's admonition in *Louk*, that it would depart from the general rule only in "extraordinary circumstances." Neither these nor any other extraordinary circumstances justified the Court's departure from that rule in *Foster*.

*E. If the Facts Were Dispositive of the Impartial Tribunal Issue in Foster, Shouldn't They Have Been Considered in Bayer MaterialScience?*

Of course, it would have been immaterial to the Foster Foundation whether the West Virginia Supreme Court ruled that it could not consider the issue of whether the tribunal was impartial for the time on appeal or ruled that

<sup>116</sup> *Id.* at 794 (citing *Whitlow*, 438 S.E.2d at 18–19). Justice Davis also wrote the opinion in *Cormier*.

<sup>117</sup> 671 S.E.2d 776 (W. Va. 2008).

<sup>118</sup> *Id.* at 783.



the Foster Foundation simply didn't prove its case—it would have lost either way. But the rationale upon which *Foster* was based mattered very much to Bayer. Unlike the Foster Foundation, Bayer raised this due process issue at every step of the appeal process, and all three circuit court decisions in Bayer's appeals acknowledged that Bayer raised the issue and explicitly ruled against Bayer on this issue. Had the court wanted to seriously consider whether the property tax appeals process violates due process, it could have addressed those issues first in the *Bayer MaterialScience* case pending before it, where a rich factual record existed and where those issues had been raised and ruled upon by the circuit court. Since the court concluded in *Foster* that

because the Foundation has not presented evidence to prove that it was denied due process when the Commission sat as the Board of Equalization and Review to hear and decide its appeal of the Woodlands property's tax assessment, the Foundation has not sustained its burden of proving that W. Va.Code § 11-3-24 is unconstitutional,<sup>119</sup>

one would expect that a review of the evidence presented by Bayer would have been required in the *Bayer* cases, as well. Such a review, however, would have been inconvenient for the court, because in the *Bayer* case, the facts in the record clearly established the bias of the Board.

First, Bayer asserted that its appraisals for its personal property for the two tax years in question were excessive by more than \$75,000,000.<sup>120</sup> Had the Board granted Bayer's appeals, the amount of money available to the county (including the county commission, the Board of Education, and several other levying bodies) would have been reduced by approximately \$1,100,000,<sup>121</sup> more than five times the amount at issue in *Foster*.

Secondly, the transcripts of the hearings before the Board were peppered with comments from the bench that indicated that the Board was more

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<sup>119</sup> *In re Tax Assessment of Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 160 (W. Va. 2008).

<sup>120</sup> Bayer MaterialScience argued that its personal property was overvalued by \$10,220,326 for tax year 2006. See Brief of Petitioner-Appellant at 48, *Bayer MaterialScience, LLC v. State Tax Commissioner*, 672 S.E.2d 174 (W. Va. 2008). Bayer CropScience argued that its real property was overvalued by \$5,919,100 and its personal property was overvalued by \$27,382,687 for tax year 2006. See Brief of Petitioner-Appellant at 46, *Id.* Bayer MaterialScience argued that its personal property was overvalued by \$2,263,782 for tax year 2007, and Bayer CropScience argued that its personal property was overvalued by \$30,138,619 for that tax year. See Brief of Petitioner-Appellant at 42, *Id.* The total appraised value at issue was \$75,924,514.

<sup>121</sup> The amount of tax due on the appraised value for Bayer MaterialScience at issue for tax year 2006 was \$150,000. See Brief of Petitioner-Appellant at 17, *Id.* For Bayer CropScience for tax year the amount was \$480,000. See Brief of Petitioner-Appellant at 26, *Id.* For both Bayer CropScience and Bayer MaterialScience together for tax year 2007 the amount of tax was \$470,000. See Brief of Petitioner-Appellant at 42, *Id.* The total tax at issue was \$1,100,000.

concerned with its responsibility to protect the public fisc than it was to fairly consider the taxpayers' claims. For example, during hearings addressing Bayer's claims, the president of the commission repeatedly allowed his concern for Kanawha County's finances to enter his deliberations as a purportedly neutral jurist, stating "[o]f course, when you are a big multi-national corporation, you say it's only a million here, only two million apart. I thought that was interesting. These decisions have a real impact on the tax base of this State and County."<sup>122</sup>

He also felt compelled to protect the interests of the Kanawha County Board of Education, despite the fact that no representatives of that body appeared at any of Bayer's hearings, observing

[s]o, if the Board of Education -- They participated in the last matter. You are talking arguably \$350,000.00 loss to the Board of Education . . . . That's just off my head. And, again, the loss of income isn't germane except it's germane in the respect that this is a serious matter and does have ramifications outside of this piece of property.<sup>123</sup>

The commission president didn't try to hide the fact that his primary concern was the effect a favorable ruling for Bayer could be applicable to other taxpayers, asking "[i]f we would do this, shouldn't we then go to every other chemical plant and industrial plant in Kanawha County and immediately reduce their taxes or the Tax Commissioner should do it this exact same amount because doesn't this apply to the other chemical plants as well?"<sup>124</sup> Later, he asked "I mean, is everybody going to be entitled to this?"<sup>125</sup> Finally, he was concerned that the effect the Board's decision, had it been favorable to Bayer, would have on individual taxpayers:

So, on the catch side of that, if that is really the case, the Tax Commissioner should look at all that property, and it shouldn't apply just to Kanawha County. And, if indeed, a reviewing court would overturn this, they ought to apply it to every industrial property in the State. I will say this. If this keeps up, the average taxpayer won't be able to afford a carport, much less a car like that gentleman had in here . . . .<sup>126</sup>

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<sup>122</sup> Transcript of Hearing at 21, *Id.*

<sup>123</sup> *Id.* at 24.

<sup>124</sup> Transcript of Hearing at 83, *Bayer MaterialScience, LLC v. State Tax Commissioner*, 672 S.E.2d 174 (W. Va. 2008).

<sup>125</sup> Transcript of Hearing at 156, *Bayer MaterialScience*, 672 S.E.2d 174.

<sup>126</sup> Transcript of Hearing at 21, *Bayer MaterialScience*, 672 S.E.2d 174.

It is also relevant to note that, for every taxpayer that appeared the same day Bayer did for its hearing for tax year 2007, the Commission consistently asked each for the exact amount of the reduction in tax revenue that would occur were the Tax Commissioner's appraisal reversed.<sup>127</sup> The records in the Bayer appeals make any inference of bias unnecessary; any rational person would recognize the obvious bias arising from the apparent conflict between the Commission's budgeting and executive capacities,<sup>128</sup> on the one hand, and its quasi-adjudicative function in reviewing assessments, on the other. Incredibly, in one of the *Bayer* cases, the Tax Commissioner admitted that he applied a "fairly arbitrary" methodology to value Bayer's property,<sup>129</sup> and that he had "no idea" whether it accounted for the company's true and actual value as the West Virginia Constitution requires.<sup>130</sup> Nevertheless and inevitably, the County Commission adopted the Tax Commissioner's value of Bayer's property.

In contrast to the purely legal arguments advanced by the Foster Foundation in its briefs, then, the records in the *Bayer* cases presented the court with a fully developed factual record upon which to base its decision—but the *Bayer MaterialScience* decision is completely devoid of any mention or analysis of any of the facts cited by Bayer. Rather, a single paragraph contains the cursory analysis of the due process claim in the *Bayer* decision:

With respect to the constitutionality of the statute at issue herein, W. Va.Code § 11-3-24, Bayer contends that permitting county commissions to sit as boards of equalization and review to hear and decide taxpayers' challenges of allegedly erroneous

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<sup>127</sup> See Transcript of Hearing at 27, 43–44, 52, 55–56, 60, and 76, *Bayer MaterialScience*, 672 S.E.2d 174.

<sup>128</sup> The Kanawha County Commission admits that its "primary function" is to oversee the county's "budget development and management," including the "management of county assets," explaining that "[t]he primary function of the County Commission is budget development and management, overseeing purchasing for the county, management of county assets, and management of technology resources – overseeing the governing, management and protection of Kanawha County and its citizens." KANAWHA COUNTY COMMISSION, MISSION STATEMENT, <http://www.kanawha.us/commission/default.aspx> (last visited Mar. 9, 2011).

According to the West Virginia State Auditor's Office, for the 2005-2006 fiscal year, Kanawha County's Revised General Revenue Fund Budget called for income from current year property taxes in the amount of \$27,135,970 and \$1,866,000 for previous years, for a total of \$29,001,970. The total revenue budgeted was \$39,930,771. Property taxes, therefore, make up more than 72.6% of Kanawha County's budget, far in excess of the 42% of the village income came from the mayor's court in *Ward*. (Budget document available at: [http://www.wvauditor.com/services/levyestimates/forms/county\\_05-06/CountyBudgMonit.xls](http://www.wvauditor.com/services/levyestimates/forms/county_05-06/CountyBudgMonit.xls). (Last visited June 6, 2006). Note: Does not include the Kanawha County Commission's excess levy or the levies for Kanawha County Schools).

<sup>129</sup> See Transcript of Hearing at 321–22, *Bayer MaterialScience, LLC v. State Tax Commissioner*, 672 S.E.2d 174 (W. Va. 2008). (Tax Commissioner's witness also admitting that his method of apportionment "does not" "relate back to the profitability of a particular plant").

<sup>130</sup> *Id.*

tax assessments unconstitutionally deprives such taxpayers of a hearing before an impartial tribunal. We recently considered and resolved this same constitutional inquiry in the companion case to this consolidated appeal, *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*[.] In *Foster*, after conducting the requisite statutory construction and constitutional analyses, we determined that the procedure for hearing and deciding taxpayers' appeals adopted by the Legislature in W. Va.Code § 11-3-24 is constitutional: "W. Va.Code § 11-3-24 which establishes the procedure by which a county commission sits as a board of equalization and review and decides taxpayers' challenges to their property tax assessments, is facially constitutional." Applying this holding to the decisions of the circuit court, which found that the subject statute had not deprived Bayer of due process, we find that Bayer is not entitled to relief on this issue because the statute of which it complains, W. Va.Code § 11-3-24, is constitutional. Accordingly, we affirm the circuit court's rulings.<sup>131</sup>

Having deprived the Foster Foundation of its opportunity to prove discrimination at the circuit court level, the West Virginia Supreme Court of Appeals deprived Bayer of a fair hearing of its claims by simply ignoring them.

*F. A County Commission Simply Cannot Function as an Impartial Tribunal*

When sitting as a board of equalization and review, county commissioners are charged with the power to determine whether property taxes imposed on a taxpayer are excessive, a determination that could undermine their ability to perform their executive responsibilities. Given the financial responsibilities of the county commissioners, any taxpayer who appears before the commission in its role as a board of equalization and review immediately understands that his request to lower the value of his property below its appraised value is likely to be greeted with great skepticism. Similar to the officials at issue in *Tumey* and *Ward*, county commissioners, therefore, "occup[y] two practically and seriously inconsistent positions, one partisan and the other judicial." Moreover, the commissioners' executive interests offer precisely the sort of "possible temptation to the average man as a judge" that would cause him to view the taxpayer's case with partiality and bias.<sup>132</sup> Requiring individuals who are ac-

<sup>131</sup> *Bayer MaterialScience, LLC v. State Tax Commissioner*, 672 S.E.2d 174, 184–85 (W. Va. 2008) (internal citations omitted).

<sup>132</sup> See *Tumey v. Ohio*, 273 U.S. 510 (1927); *Williams v. Brannen*, 178 S.E. 67 (W. Va. 1935). See also *Killen v. Logan Cnty. Comm'n*, 295 S.E.2d 689, 712 (1982) (Neely, J., dissenting) ("The

countable to county residents to deliver government services to also adjudicate whether the funds available to perform those services should be returned to entities challenging their tax assessments creates both an inherent conflict of interest as well as the appearance of such a conflict in violation of the requirements of due process.

The commissioners' duty to oversee the fiscal affairs of the county and accompanying executive interest in maximizing the county's revenue cannot be squared with the requirement that they impartially assess the taxpayer's valuation challenges which would deprive the county commission of revenue, regardless of how sincerely the commissioners assert their ability to act fairly. As such, the Commission's proceedings violated Bayer's right to due process, and the circuit court decisions in *Bayer* and *Foster* should have been reversed. Yet the Supreme Court of Appeals selected the *Foster* case as the case in which to address the constitutional issues before it, despite the fact that by its own precedents, the constitutional issues should not even have been addressed because they were not raised and developed in the circuit court below. In *Foster*, the court misconstrued the applicable decisions of the United States Supreme Court and ignored the bias of a county commission rendered obvious by the commission's constitutional and statutory duties, even absent the inflammatory statements of the county commissioners in the *Bayer MaterialScience* case. It found the appeal process to be constitutional because the Foster Foundation did not present sufficient evidence of bias, but then refused to examine the fully developed factual record in *Bayer MaterialScience*.

#### G. Cases Decided After *Bayer MaterialScience* and *Foster*

The United States Supreme Court recently reaffirmed its holdings in *Tumey* and *Ward* in *Caperton v. A.T. Massey Coal Co.*,<sup>133</sup> a case that was of particular interest in West Virginia. In the context of when a judge must be disqualified, the court again stated that "[i]t is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'"<sup>134</sup> It cautioned, however, that "most matters relating to judicial disqualification [do] not rise to a constitutional level."<sup>135</sup> Nevertheless, it recognized *Tumey* as "[t]he early and leading case on the subject,"<sup>136</sup> and explained that it articulated "the common-law rule that a judge must recuse himself when he has 'a direct, personal, substantial, pecuniary interest' in a case."<sup>137</sup> At the same time, the Court in *Caperton* em-

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pressures on the county commissions are probably such that they will quickly use all money available to them.").

<sup>133</sup> 129 S.Ct. 2252 (2009).

<sup>134</sup> *Id.* (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

<sup>135</sup> *Id.* (quoting *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948)).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* (quoting *Tumey*, 273 U.S. at 523).

phasized that *Tumey* was not limited to that narrow holding. Citing it as an example of one of two instances that have emerged that were not discussed at common law but which, as an objective matter, require recusal,<sup>138</sup> the Court characterized *Tumey* as an example of a case in which a judge of a local tribunal “had a financial interest in the outcome of a case, although the interest was less than what would have been considered personal or direct at common law,”<sup>139</sup> because “experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.”<sup>140</sup>

The Court reiterated that, in *Tumey*, “the Due Process Clause required disqualification ‘both because of [the mayor-judge’s] direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village,’”<sup>141</sup> and restated the controlling principle to be:

Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.<sup>142</sup>

Emphasizing that in *Tumey*, it was concerned “with more than the traditional common-law prohibition on direct pecuniary interest” but “was also concerned with a more general concept of interests that tempt adjudicators to disregard neutrality,”<sup>143</sup> the Court described *Ward*, as another case that turned on the “‘possible temptation’ the mayor might face” and recalled that the “mayor’s ‘executive responsibilities for village finances may make him partisan to maintain the high level of contribution [to those finances] from the mayor’s court.’”<sup>144</sup> The Court also cited *Gibson v. Berryhill* as a case in which “the [judge’s] financial stake need not be as direct or positive as it appeared to be in *Tumey*.”<sup>145</sup>

*Caperton* directly contradicts the West Virginia Supreme Court’s portrayal in *Foster* that

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<sup>138</sup> *Id.*

<sup>139</sup> *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2259–60.

<sup>140</sup> *Id.* at 2259 (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1974)).

<sup>141</sup> *Id.* at 2260 (quoting *Tumey v. Ohio*, 273 U.S. 510, 535 (1927)).

<sup>142</sup> *Id.* (quoting *Tumey*, 273 U.S. at 532).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* (quoting *Ward v. Monroeville*, 409 U.S. 57, 60 (1972)).

<sup>145</sup> *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2260 (describing the situation in *Gibson v. Berryhill*, 411 U.S. 564 (1973), as “an administrative board composed of optometrists had a pecuniary interest of ‘sufficient substance’ so that it could not preside over a hearing against competing optometrists”)

[w]hen faced with cases questioning the impartiality of a hearing tribunal, the United States Supreme Court generally has found a hearing tribunal to be partial when there exists a direct pecuniary interest in the outcome of the litigation. . . . However, when no such pecuniary interest is present, the United States Supreme Court typically has found the tribunal to satisfy the requirements of due process.<sup>146</sup>

Rather, as the taxpayers in *Bayer* and *Foster* urged, the obvious partisanship of the members of a county commission to maintain a high level of contribution to the county's finances predisposes them to rule against taxpayers, and due process demands they should be disqualified from acting as the tribunal to determine tax appeals.

#### 1. Institutional Bias

Following the decision in *Caperton*, in *Mountain America, LLC v. Huffman*,<sup>147</sup> the West Virginia Supreme Court of Appeals had an opportunity to review its decisions in *Foster* and *Bayer* in light of the decision in *Caperton*. There, taxpayers again asserted the institutional bias of the commission resulted in an inherent conflict of interest, again citing, *inter alia*, *Tumey* and *Ward*. However, the West Virginia Supreme Court of Appeals made short work of the claims of inherent bias, citing only its decision in *Foster*:

We recently had opportunity to visit the issue of whether West Virginia Code § 11-3-24 is constitutional insofar as it requires county commissions to sit as boards of equalization and review, and we found that this statute is facially constitutional. In *Foster*, we also determined that the County Commission's overarching interest, as the governmental body charged with superintendence of the fiscal affairs of the county, in the outcome of every challenge to its tax base, was not a sufficient conflict of interest to support a taxpayer's due process violation claim in deciding the outcome of such challenges.<sup>148</sup>

Without even mentioning the holding in *Caperton* decided almost six months earlier (a decision with which it no doubt was quite familiar), the court concluded:

<sup>146</sup> *In re Tax Assessment of Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 159–60 (W. Va. 2008).

<sup>147</sup> 687 S.E.2d 768 (W. Va. 2009), *cert. denied*, 130 S.Ct. 2377 (2010).

<sup>148</sup> *Id.* at 781 (internal citations omitted).

Because this Court, in our existing precedent, has resolved the issue of the facial constitutionality of West Virginia Code § 11-3-24 as it pertains to the issues of whether the county commission may impartially sit as the board of equalization and review . . . , we need not here analyze these particular arguments any further.<sup>149</sup>

However, the court did address additional aspects of the current property tax appeals system that, according to the taxpayers, render it inherently unfair. First, the Appellants asserted that the fact that the County Commission filed an answer to the taxpayers' Petition for Appeal in the Circuit Court was yet another indication that the County Commission was not impartial. Any casual observer might well conclude that the fact that the County Commission (which was not named as a party by Mountain America when it filed its appeal in circuit court) sought to intervene was evidence that the County Commission had a partisan interest to protect the county's fisc and was actually biased. However, the court rejected this claim, observing that "[c]ounty commissions have often been made parties to these types of appeals. Indeed, County Commissions have made numerous appearances in these types of appeals before this Court."<sup>150</sup> The court reasoned that:

By filing a response to the Appellants' Petition for Appeal, the County Commission urged the circuit court to affirm its ruling that the assessments were proper. The County Commission's response was necessarily due to the fact that in making a ruling upholding the Assessor's valuation of Mountain America's residual property, the County Commission, sitting as the Board of Equalization and Review, was not statutorily required to issue a written opinion. Thus, by virtue of requiring a response to a petition for appeal from a County Commission decision, the circuit court was able to obtain information regarding the County Commission's reasoning in upholding the Assessor's valuations. When balancing the circuit court's interest in acquiring necessary information from the County Commission regarding its review of tax appeals, with the general due process interests of the taxpayers to be provided an avenue of appeal from a property tax assessment, we do not believe that this procedure necessarily demonstrates a level of bias constituting a deprivation of the Appellant's due process.<sup>151</sup>

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<sup>149</sup> *Id.* at 782.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 782–83.



This reasoning ignores two important points. First, the legislature requires that the circuit court limit its review to the record made before a board of equalization and review.<sup>152</sup> That restriction alone prevents the circuit court from “obtain[ing] information regarding the county commission’s reasoning in upholding the Assessor’s valuations” from a pleading filed for the first time before the circuit court.<sup>153</sup> The West Virginia Supreme Court itself reiterated this limitation in *In Re Tax Assessment Against American Bituminous Power Partners, L.P.*, in which it discussed the standard by which a circuit court reviews the decision of a board of equalization and review and said that

[t]he statute provides little in the way of guidance as to the scope of judicial review, although it does expressly limit review to the record made before the county commission . . . judicial review of a decision of a board of equalization and review regarding a challenged tax-assessment valuation is limited to roughly the same scope permitted under the West Virginia Administrative Procedures Act.<sup>154</sup>

Secondly, if the fact that a county commission sitting as a board of equalization and review is not required to issue a written opinion creates a problem, there’s a much more straightforward solution to that problem. In *Citizens Bank of Weirton v. West Virginia Board of Banking and Financial Institutions*,<sup>155</sup> the Supreme Court of Appeals recognized that under the Administrative Procedures Act, administrative agencies are required to include findings of fact and conclusions of law in their final order. In *Monongahela Power Co. v. Public Service Commission of West Virginia*,<sup>156</sup> the court held that “[w]hile *Citizens Bank*, dealt with a review under the administrative procedure act, W.Va.Code, 29A-1-1, et seq., which excludes the Public Service Commission from its ambit . . . the case principles are clearly applicable to *any* administrative review.”<sup>157</sup> The rationale stated by the court in Syllabus Point 3 of *Citizens Bank* and reiterated in *Monongahela Power* is just as applicable to hearings before a board of equalization and review reviewing complex appraisal issues:

In administrative appeals where there is a record involving complex economic or scientific data which a court cannot evaluate properly without expert knowledge in areas beyond the

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<sup>152</sup> W. VA. CODE § 11-3-25 (2010).

<sup>153</sup> *Mountain Am., LLC v. Huffman*, 687 S.E.2d 768, 783 (W. Va. 2009).

<sup>154</sup> *In re Tax Assessment Against Am. Bituminous Power Partners, L.P.*, 539 S.E.2d 757, 761–62 (W. Va. 2000); *see also* Part V for a discussion of the scope of review.

<sup>155</sup> 233 S.E.2d 719 (W. Va. 1977).

<sup>156</sup> 276 S.E.2d 179 (W. Va. 1981).

<sup>157</sup> *Id.* at 182 n.4 (emphasis added) (internal citations omitted).

peculiar competence of courts, neither this Court nor the trial courts will attempt to determine whether the agency decision was contrary to the law and the evidence until such time as the agency presents a proper order making appropriate findings of fact and conclusions of law.<sup>158</sup>

In fact, the West Virginia Supreme Court subsequently imposed the requirement for written findings of fact and conclusions of law on a circuit court when it hears an appeal from a county commission sitting as a board of equalization and review. In *Stone Brooke Ltd. v. Sisinni*<sup>159</sup>, the Supreme Court of Appeals directed that

to ensure that this Court has a complete record from which to review future appeals of ad valorem tax assessments of commercial real property, we hold that when a circuit court reviews an appraisal of commercial real property made for ad valorem taxation purposes, the court shall, in its final order, make findings of fact and conclusions of law addressing the assessing officer's consideration of the required appraisal factors set forth in W. Va.C.S.R. §§ 110-1P-2.1.1 to 2.1.4 (1991)<sup>160</sup>.

In *Mountain America* then, the court had a tool at its disposal that it has willingly used in similar circumstances. The court could have simply required a county commission sitting as a board of equalization and review to henceforth issue written orders containing findings of fact and conclusions of law. Instead, it permitted the circuit court to consider material that the Appellants viewed as extending the Commission's order and as asserting new defenses developed after the fact, well after the Board ended its deliberations and adjourned *sine die*. There was no justification for permitting the County Commission to file a brief supplementing what was in the record, in direct violation of the statutory requirement that the circuit court consider only what was contained in the record before the Board found at W. Va. Code § 11-3-25, and the County Commission's willingness to do so was, in fact, evidence of its determination to protect its fisc.

## 2. Direct Pecuniary Interest

Mountain America also pointed out that the statutory scheme for the compensation of county commissioners in West Virginia gives them a direct

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<sup>158</sup> *Id.* at 181–82.

<sup>159</sup> 688 S.E.2d 300 (W. Va. 2009).

<sup>160</sup> *Id.* at 315.

pecuniary interest in the outcome of property tax appeals.<sup>161</sup> For the tax year in question, the total gross assessed value of all property in Monroe County increased by more than \$30 million, and 20% of that increase was attributable to the increases in value on the Appellants' property. As a result of that increase, Monroe County moved from compensation classification IX to VII; thus, in significant measure due to their actions upholding Assessor's values, each of the members of the County Commission of Monroe County was entitled to an annual increase of \$660 in their compensation for their part-time positions.<sup>162</sup>

The Supreme Court also made short work of Mountain America's claim that each commissioner's pay increase of \$660 annually constituted a direct pecuniary interest that disqualified him from acting as an unbiased judge:

Moreover, we seriously question whether a pay increase of \$660.00 would in fact constitute a substantial pecuniary interest prohibiting the County Commission from adjudicating this dispute. *See, e.g., Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S.Ct. 1689, 1698, 36 L.Ed.2d 488, 500 (1973) (reiterating that "[i]t is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes.")<sup>163</sup>

The suggestion that a salary increase of \$660 is not a "substantial pecuniary interest" flatly contrary to decisions of the United States Supreme Court. In *Tumey*, the Court decided that the sum of twelve dollars from each criminal defendant before the local judge, which he would not have received if the defendant had been acquitted,<sup>164</sup> was not a "minute, remote, trifling, or insignificant interest."<sup>165</sup> Consequently, the Court held that it was "certainly not fair to each defendant brought before the mayor for the careful and judicial consideration of his guilt or innocence that the prospect of such a prospective loss by the mayor should weigh against his acquittal."<sup>166</sup> Moreover, the Court's cite to *Gibson* is disturbing given the treatment given that case by the United States Supreme Court in *Caperton*, in which it referred to *Gibson* as a case in which "the [judge's] financial stake need not be as direct or positive as it appeared to be in *Tumey*."<sup>167</sup> Certainly, the pecuniary interest in *Gibson* was far more tenuous

<sup>161</sup> Brief of Appellant at 29, *Mountain Am., LLC v. Huffman*, 687 S.E.2d 768 (W. Va. 2009) (No. 34426).

<sup>162</sup> *Id.*; see W. VA. CODE §§ 7-7-3 and 7-7-4(e)(5) (2010).

<sup>163</sup> *Mountain Am.*, 687 S.E.2d at 783 (W. Va. 2009).

<sup>164</sup> *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

<sup>165</sup> *Id.* at 532.

<sup>166</sup> *Id.*

<sup>167</sup> *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252, 2260 (2009) (quoting *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973)) (alteration in original).

than the \$660 (or nearly a three percent raise in their annual salary) that the commissioners received as a result of their decision here.

Equally baseless is the suggestion by the court in *Mountain America* that it could avoid the due process challenge altogether:

Furthermore, as to *Mountain America's* second argument regarding the direct pecuniary interest of the County Commission members in this case, to the extent that we have made the determination, as further discussed below, that the Assessor's valuation of *Mountain America's* residual property was not excessive, we need not address Appellant's argument that the members of the County Commission received increased salaries as a result of the assessment.<sup>168</sup>

That suggestion directly conflicts with the Court's holdings in *Ward* and *Tumey*. In *Tumey*, the United States Supreme Court rejected the argument that "the evidence shows clearly that the defendant was guilty and that he was only fined . . . the minimum amount, and therefore that he cannot complain of a lack of due process."<sup>169</sup> Chief Justice Taft explained, "[n]o matter what the evidence was . . . he had the right to have an impartial judge . . . and was entitled to halt the trial because of the disqualification of the judge."<sup>170</sup> Likewise, in *Ward*, the Court rejected the suggestion that "unfairness at the trial level can be corrected on appeal and trial *de novo*" because a litigant is "entitled to a neutral and detached judge in the first instance."<sup>171</sup>

### 3. The Cumulative Effect of Other Prejudicial Aspects of the Appeals Process

Finally, in *Mountain America*, the Appellants argued that the cumulative effect of multiple prejudicial aspects of West Virginia's property tax appeals system weighs heavily against the "appearance of justice" required under the Due Process Clause.<sup>172</sup> Among these prejudicial aspects were the practical difficulty of obtaining the basic information required by the taxpayer to prepare his appeal and the extremely short timeframe during which the taxpayer must prepare the appeal.<sup>173</sup>

As to the former, information necessary for the appeal includes (a) the Assessor's proposed taxable values for the ensuing tax year for the taxpayer's

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<sup>168</sup> *Mountain Am., LLC v. Huffman*, 687 S.E.2d 768, 783 (W. Va. 2009).

<sup>169</sup> *Tumey*, 273 U.S. at 535.

<sup>170</sup> *Id.*

<sup>171</sup> *Ward v. Monroeville*, 409 U.S. 57, 61–62 (1972).

<sup>172</sup> Brief of Appellant at 34–35, *Mountain Am.*, 687 S.E.2d 768 (W. Va. 2009) (No. 34426).

<sup>173</sup> *Id.* at 35.

property, (b) the Assessor's proposed taxable values for the ensuing tax year for comparable properties (required if the taxpayer asserts that the value of his property is not properly equalized with that of other properties), and (c) the price of comparable properties in the area that recently sold (required to permit the taxpayer's appraiser form an opinion as to the market value of the subject property). As Mountain America noted, since the property books don't have to be completed by the Assessor until February 1, obtaining the Assessor's proposed taxable values typically requires the filing of a request under the Freedom of Information Act (FOIA). The cost of doing so, and the cost of obtaining the services of a licensed, professional appraiser may simply be out of reach for the typical property owner in West Virginia.<sup>174</sup>

Even more damaging than the difficulty and cost of obtaining the required information, however, is the extremely short timeframe during which the taxpayer must prepare the appeal. Even under the most favorable circumstances, a taxpayer who receives a notice of increase has significantly less than one month to decide whether to appeal, retain counsel, find an appraiser, and prepare his case until the county commission hears the appeal. Mountain America asserted that "[t]he practical effect of such constricted time frames . . . is to inherently limit the effectiveness of any such challenge – particularly one based on a claim of unequalized or discriminatory treatment involving proof of the proposed taxable values of numerous other comparable properties."<sup>175</sup>

The court did not directly address the taxpayers' claim that the cumulative effect of the prejudicial aspects amounts to a denial of due process. Rather, in a breathtaking display of circular logic, the court held that, because Mountain America didn't introduce several specific pieces of information (including an appraisal of Mountain America's property) that the court thought were relevant,

Mountain America has not met its burden to prove by clear and cogent evidence the requisite facts establishing that the time frame for a tax assessment appeal under West Virginia Code § 11-3-24 is so unreasonable or arbitrary as to amount to a denial of due process of law in this case.<sup>176</sup>

In other words, because the taxpayer's appraiser didn't have time to prepare both the evidence that he did present at the hearing before the Board as to the value of surrounding properties and the missing evidence that the court thought was essential, the taxpayer couldn't prove that it was prejudiced by not having enough time to prepare.

Mountain America sought review of the Court's decision on several grounds, including the lack of an impartial tribunal, but the United States Su-

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<sup>174</sup> *Id.* at 31–32 and n.14.

<sup>175</sup> *Id.* at 32.

<sup>176</sup> *Mountain Am., LLC v. Huffman*, 687 S.E.2d 768, 784 (W. Va. 2009).

preme Court denied certiorari.<sup>177</sup> Notwithstanding the lack of judicial relief, the Legislature recently made changes to the property tax appeals system. While the more glaring due process issues remain, some of the prejudicial aspects existing system have been lessened, at least to a degree.

#### *H. Changes to the Property Tax Appeal Process in SB 401*

In the 2010 Regular Session, the Legislature enacted SB 401 (Chapter 185, Acts, Regular Session, 2010), which made significant changes to the property tax appeals process. While this legislation makes some incremental improvements to the process, it unfortunately does nothing to correct the glaring due process violations. The county commission remains as the tribunal designated to hear first level appeals, and, as discussed below, the “clear and convincing” standard of proof remains impermissibly high.

##### *1. Incremental Improvement is SB 401*

SB 401 eliminates some of the aspects of the property tax appeals system that inhibit a taxpayer’s ability to mount an effective appeal and undoubtedly makes the overall process less unfair to taxpayers generally. Beginning with tax year 2012 (assessment date July 1, 2011), taxpayers will be required to file returns earlier in the year.<sup>178</sup> The penalties for failure to file remain in place; in addition, it is now a misdemeanor for “[a]ny owner, operator or producer, whether a natural person, limited liability company, corporation, partnership, joint venture or other enterprise” to “willfully fail[] to make a return within thirty days from the day it is herein required.” Upon conviction, the business may be fined \$100 for each month the failure continues.<sup>179</sup>

The most stringent penalty, however, has been somewhat relaxed. Under the prior version of West Virginia Code section 11-3-10, a taxpayer that failed to file a return, refused to answer or falsely answered a question posed by an assessor or the Tax Commissioner, or that failed to deliver any statement required by law was denied all remedy provided by law for the correction of any

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<sup>177</sup> *Mountain Am., LLC v. Huffman*, 130 S.Ct. 2377 (April 26, 2010).

<sup>178</sup> West Virginia Code section 11-3-12 (2010) now requires corporations and banking institutions to file returns of the value of their tangible personal property and real property by September 1. West Virginia Code section 11-3-15 (2010) now requires individuals or unincorporated firms engaged in any trade or business taxable by law to file returns of the value of their tangible personal property, all goods and property kept for sale and remaining unsold, and real property used in connection with this business by September 1. For property appraised by the Tax Commissioner, West Virginia Code § 11-6K-1(b) (2010) now requires all owners or operators of natural resources property, except oil-producing property, natural gas-producing property, and managed timberland, to file a return on or before May 1 preceding the July 1 assessment date. Section 11-6K-1(c) now requires all owners or operators of industrial property, oil-producing property and natural gas-producing property, to file returns on or before August 1.

<sup>179</sup> W. VA. CODE § 11-6K-3(d) (2010).

assessment. In other words, a taxpayer who fails to file a property tax return has no way to protest the assessor or Tax Commissioner's assessed value, no matter what it turns out to be. Under the new version of that statute, that harsh sanction can still be enforced, but only after the assessor or the Tax Commissioner "notified such person, firm or corporation in writing that this penalty will be asserted and the requested information is not provided within fifteen days of the date of receipt of the notice."<sup>180</sup>

If the assessor increases the value of a taxpayer's property, the taxpayer will now receive a notice of the increase earlier in the year,<sup>181</sup> which will provide slightly more time in which to decide whether to protest the assessment and to prepare for the protest. Even before the required notice is issued, however, the Code now explicitly provides that at any time after the required returns have been filed, a taxpayer may "apply to the assessor of the county in which the property was situated on the assessment date for information about the classification, taxability or valuation of the property for property tax purposes for the tax year following the July 1 assessment date."<sup>182</sup> There was no similar provision under the previous Code; a taxpayer's only recourse was to file a FOIA request to obtain the data prior to the date the property books were completed and delivered to the county commission.

For valuation issues, a taxpayer whose property is appraised by the Assessor who applies to the Assessor for information, who is dissatisfied with the Assessor's response, and who receives a notice of increase for real property or business personal property may (but is not required) to use a new informal review process wherein the taxpayer files a Petition for Review by the Assessor. For either type of property, the taxpayer must provide the taxpayer's opinion of the true and actual value of the property and must support that value with "substantial information." For business personal property, the term "substantial information" is not defined; for real property, it means identifying which of the three approaches to value (cost approach, income approach, or market data approach) the taxpayer used to value the property, together with specified informa-

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<sup>180</sup> *Id.* § 11-3-10(a).

<sup>181</sup> For property appraised by the Assessor, notices of an increase in value of real property of more than 10% over the value for the previous year must be mailed by January 15 if the increase is also more than \$1000. *Id.* § 11-3-2a(a). Notices of an increase in value of the aggregate amount of tangible personal property owned by an organization engaging in business activity of more than 10% over the value for the previous year must be mailed by January 15 if the increase is also more than \$100,000. *Id.* § 11-3-15b(a). For property appraised by the Tax Commissioner, no tentative assessments need be transmitted to the taxpayer if the increase in value is less than 10% from the value for the previous year and if the increase did not exceed \$1000. Otherwise, the Tax Commissioner must issue tentative appraisals for all industrial property and natural resources property except oil-producing property, natural gas-producing property, and managed timberland by October 15. *Id.* § 11-6K-4(e) (2010). The Tax Commissioner must issue tentative appraisals for all oil-producing property, natural gas-producing property, and managed timberland by December 1. *Id.*

<sup>182</sup> *Id.* § 11-3-23a(a) (2010).

tion for each approach.<sup>183</sup> This Petition must be filed within five days of the date the taxpayer receives the notice of increased assessment under West Virginia Code section 11-3-2a or section 11-3-15b or the notice of increased value for real property was published as a Class II-0 legal advertisement as provided in that section. The Assessor must meet with the taxpayer if the taxpayer so requests and must respond in writing by February 10.<sup>184</sup>

If the Assessor grants the requested relief, the taxpayer may not further appeal the Assessor's decision.<sup>185</sup> If the taxpayer and the Assessor reach a negotiated settlement, neither may appeal.<sup>186</sup> However, if the assessor denies the taxpayer's petition in whole or in part, or if the assessor does not respond by Feb. 10, or if the taxpayer elects to forgo the informal Petition for Review process, the taxpayer may file a protest with the county commission.<sup>187</sup>

There is a corresponding process by which a taxpayer who receives a Notice of Tentative Assessment from the Tax Commissioner for property appraised by him<sup>188</sup> can informally petition the Tax Commissioner requesting a review of the tentative appraisal.<sup>189</sup> In addition, the assessor where the property is located also receives a copy of the tentative appraisal and can request this informal review.<sup>190</sup> The Tax Commissioner must meet with the taxpayer if the taxpayer requests a meeting<sup>191</sup> and must rule on the request by January 15.<sup>192</sup> If the Tax Commissioner agrees with the petition, the tentative appraisal is modified accordingly. However, whether or not the Tax Commissioner grants the relief requested, the taxpayer may still appeal to the county commission.<sup>193</sup>

The process for protesting an assessment to a county commission has been changed in several respects. While a board of equalization and review can still adjourn *sine die* "anytime after February 15" but "not later than the last day

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<sup>183</sup> See *Id.* § 11-3-15c (2010) (real property); *Id.* § 11-3-15d (2010) (business personal property). Note that section 11-3-15e defines what information is required to support an income approach in a Petition for Review by the Assessor. That section indicates that an income approach can be used to value business personal property as well as real property. See *Id.* § 11-3-15e(a) (2010) ("A petition that is filed with the assessor under section fifteen-c or fifteen-d of this article based on the income approach to value shall include . . .") (emphasis added).

<sup>184</sup> *Id.* §§ 11-3-15d(b) to -15h(a)

<sup>185</sup> W. VA. CODE § 11-3-15i(a) (2010).

<sup>186</sup> *Id.* § 11-3-15i(b).

<sup>187</sup> *Id.* §§ 11-3-15f to -15i(c) (2010).

<sup>188</sup> This informal process is not available to owners of oil-producing property, natural gas-producing property, and managed timberland, probably because such notice of tentative assessment isn't required until December 1, which doesn't leave enough time to pursue the informal process with the Tax Commissioner.

<sup>189</sup> W. VA. CODE § 11-6K-5(a) (2010).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* § 11-6K-5(b).

<sup>192</sup> *Id.* § 11-6K-5(c).

<sup>193</sup> *Id.*



of February of the tax year,”<sup>194</sup> a taxpayer who desires to file a protest with the Board can do so on or before February 20, even if the Board has already adjourned *sine die* prior to that date.<sup>195</sup> The protest must be filed in writing and must identify “the amount of the assessed value the taxpayer believes to be in controversy and state[] generally the taxpayer’s reason or reasons for filing the protest.”<sup>196</sup>

In perhaps the most significant change to the property tax appeals process, the taxpayer can elect to have its protest heard by the county commission sitting as a board of assessment appeals in October, rather than by the county commission sitting as a board of equalization and review in February. This election may be made either when the written protest is filed or in writing filed on or before the day on which the appeal is to be heard by the board of equalization and review.<sup>197</sup> Moreover, upon request of any party, the board of assessment appeals may, on or before October 1, “develop a discovery schedule for the exchange of information between the taxpayer and the assessor and, in matters involving industrial property or natural resources property, the Tax Commissioner.”<sup>198</sup> This eight month delay and the opportunity for discovery will give the taxpayer a much better opportunity to prepare the appeal. The board of assessment appeals adjourns *sine die* by October 31 unless “the board, by majority vote, agrees to extend the term if necessary to afford the parties due process and to complete its work. . . .”<sup>199</sup>

The board of assessment appeals may assign the appeal to a hearing examiner for the taking of evidence if the hearing examiner is mutually agreed to by the parties to the appeal.<sup>200</sup> Theoretically, this provision means the parties could agree to appoint someone knowledgeable in both appraisal techniques as well as the law to hear property tax appeals.

Whether the protest is heard by the county commission sitting as a board of equalization and review in February or as a board of assessment appeals in October, the taxpayer may appeal either board’s decision to the circuit court of the county in which the property books are made out.<sup>201</sup> If the protest was heard by the board of equalization and review, the application for relief must be filed “at any time up to thirty days after the adjournment of the board”; if the protest was heard by the board of assessment appeals, the application for relief must be filed “at anytime up to thirty days after the order of the board of

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<sup>194</sup> *Id.* § 11-3-24(a).

<sup>195</sup> W. VA. CODE § 11-3-23a(d)(2) (2010).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* § 11-3-24b(c).

<sup>199</sup> *Id.* § 11-3-24b(i).

<sup>200</sup> *Id.* § 11-3-24b(d).

<sup>201</sup> W. VA. CODE § 11-3-25(a) (2010).

assessment appeals is served on the parties. . . ."<sup>202</sup> Either the taxpayer or the State (represented by the Prosecuting Attorney or the Tax Commissioner) may apply for relief to the circuit court.<sup>203</sup>

As was true in the old version of the Code, the applicant for relief is still responsible for having a transcript prepared of the hearing before either board. That transcript, together with the complete record, as certified by the Clerk of the County Commission, containing "all papers, motions, documents, evidence and records as were before the board," must be filed with the circuit court.<sup>204</sup> The time frame, however, for filing the record and the transcript has been enlarged. Under the old version, the record had to be filed within the same time as the application had to be filed; that is, "at any time up to thirty days after the adjournment of the board." Under the new version, the evidence shall be certified and transmitted within thirty days "after the petition for appeal is filed with the court or judge, in vacation."<sup>205</sup>

As was true in the old version, if the taxpayer appeared before the board, or received actual notice of the increase, then the circuit court determines the appeal only from the evidence contained in the record made before the board. However, in another significant change in the new version, if the circuit court determines that the record made before the board is inadequate, either because (1) the parties had insufficient time to present evidence at the hearing before the board to make a proper record, (2) the parties received insufficient notice of changes in the assessed value of the property and the reason or reasons for the changes to make a proper record at the hearing before the board, (3) of irregularities in the procedures followed at the hearing before the board, or (4) for any other reason not involving the negligence of the party alleging that the record is inadequate,

the court may remand the appeal back to the county commission of the county in which the property is located, even after the county commission has adjourned *sine die* as a board of equalization and review or a board of assessment appeals for the tax year in which the appeal arose, for the purpose of developing an adequate record upon which the appeal can be decided.<sup>206</sup>

The county commission must conduct a hearing in the remanded matter within ninety days of circuit court's order.<sup>207</sup>

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<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* § 11-3-25(b).

<sup>205</sup> *Id.* § 11-3-25(b).

<sup>206</sup> *Id.* § 11-3-25(c).

<sup>207</sup> W. VA. CODE § 11-3-25(c) (2010).

If the appeal is conducted on the record, it now must be briefed, argued, and submitted to the court within eight months of having been filed, and the court must issue its decision within ninety days after the last brief was filed.<sup>208</sup> The new Code also confirms that this is a post-deprivation appeals process. Taxpayers must pay disputed taxes and not let taxes fall delinquent; if they do, the circuit court must dismiss the appeal unless taxes due are paid within twenty days of second half taxes becoming delinquent.<sup>209</sup> If the final result of the circuit court's decision is that the taxpayer overpaid his taxes, the county shall pay interest at the rate established in West Virginia Code sections 11-10-17 and 11-10-17a for overpayments of taxes collected by the Tax Commissioner. The interest is computed from the date the overpayment was received by the sheriff to the date of the refund check or the date the credit is actually taken against taxes that become due after the order of the court becomes final.<sup>210</sup>

## 2. Major Constitutional Issue Remaining after SB 401

The most serious constitutional issue remaining after the enactment of SB 401 is the fact that, whether it sits as a Board of Equalization and Review or a Board of Assessment Appeals, the county commission still serves as the first level adjudicative tribunal. Although the county commission sitting as a Board of Assessment Appeals is now permitted to appoint an independent hearing examiner with relevant experience and expertise to hear and fairly determine the outcome of appeals, a county commission that is determined to protect the county's fisc isn't going to agree to a hearing examiner if it has any doubt whatsoever as to the outcome of the appeal; rather, the county commission will simply continue to hear and deny all appeals. All of the other changes made by the Legislature aren't going to change the inevitable outcome of protests heard by a county commission so motivated.

Taxpayers have every right to be frustrated by the requirement to have their appeals heard by an obviously biased tribunal. That frustration can only be more acute following the decision in *Rissler v. Jefferson County Board of Zoning Appeals*.<sup>211</sup> There, the Supreme Court of Appeals repeatedly cited *Caper-ton*, *Concrete Pipe*, *Ward*, and *Tumey*, and demonstrated that it fully understood that due process demands an unbiased tribunal. The court decided that two members of the Jefferson County Board of Zoning Appeals should have been disqualified from the Board's consideration of a dispute over an application by Thornhill, LLC, a real estate developer, for a conditional use permit (CUP) that

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<sup>208</sup> *Id.* § 11-3-25(d).

<sup>209</sup> *Id.* § 11-3-25a(a).

<sup>210</sup> *Id.* § 11-3-25a(b).

<sup>211</sup> 693 S.E.2d 321 (W. Va. 2010).

## 2011] DUE PROCESS IN WEST VIRGINIA'S PROPERTY TAX APPEALS SYSTEM 837

would enable it to build a new subdivision in a rural portion of Jefferson County.<sup>212</sup>

One board member had a prior business relationship with one of the owners of Thornhill several years before the hearing but stated that, at the time of the hearing, had no financial interest in the matter pending before the Board.<sup>213</sup> Despite the fact that the court recognized that there was an “absence of a current pecuniary interest” at the time the hearing was conducted, it nevertheless found that his previous business relationship was “problematic” and gave “rise to an appearance of impropriety” because “it is plausible that [this board member] could be inclined to rule favorably for Thornhill in its CUP application process simply because the prior relationship ‘offer[s] a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true.’”<sup>214</sup> It also found “troubling” the fact that this board member was also cofounder and president of a company which entered into an “exclusive contract to perform construction inspection services for the Jefferson County Public Service District *after* the conclusion of the underlying proceedings” in this case.<sup>215</sup> Presumably, this board member’s company would benefit from the construction inspections that would be needed if Thornhill’s CUP is approved and if the proposed subdivision was built. Together, the court found that these two factors “raise a suspicious judicial eyebrow” as to whether the petitioners actually received “[a] fair trial in a fair tribunal.”<sup>216</sup>

Another board member’s interest in the case was even more remote. The Petitioners pointed to two reasons that this board member should have been disqualified: First, he is an attorney and works for a firm that originally represented Thornhill in conjunction with its initial incorporation. Second, he performs title searches. Because the approval of Thornhill’s subdivision would result in numerous real estate closings corresponding with the subdivision’s numerous property lots, the Petitioners asserted that this board member stood to benefit from additional work. The court agreed with Thornhill and the Board that both the prior representation by the firm employing this board member in conjunction with Thornhill’s initial incorporation and any potential real estate closings work were “too remote, unrelated, and speculative to constitute disqualifying interests.”<sup>217</sup>

However, the court on its own initiative discovered an additional affiliation between the second board member and Thornhill: he had directly represented Thornhill as its attorney on an adverse possession case. The court

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<sup>212</sup> *Id.* at 328–31.

<sup>213</sup> *Id.* at 329.

<sup>214</sup> *Id.* (quoting *Concrete Pipe & Prods. of Cal. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 617 (1993)).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

<sup>217</sup> *Rissler v. Jefferson Cty. Bd. of Zoning Appeals*, 693 S.E.2d 321, 330 (W. Va. 2010).

noted that the fact that this board member had previously represented Thornhill “at the very least required the disclosure of this fact to the parties likely to be adversely affected by this relationship”;<sup>218</sup> the record, however, reflected that the board member had disclosed that fact in a meeting conducted on May 20, 2004. Given that Thornhill was the board member’s former client with whom he had a confidential relationship, the court expressed concern that his participation in the proceedings gave rise to the “appearance of impropriety.”<sup>219</sup>

In an earlier case,<sup>220</sup> the court ruled that Mr. Cassell, an assistant prosecuting attorney that represented the Board in the early stage of Thornhill’s CUP application, could not later represent Thornhill in connection with the same conditional use permit application that he was involved with while serving as the Board’s attorney. That case seems to be a relatively straightforward application of Rule 1.11(a) of the West Virginia Rules of Professional Conduct, which states, in part:

Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation.

In *Rissler*, the court also ruled that “the circuit court should have ‘resolve[d] all doubts in favor of disqualification’ and granted Ms. Rissler’s motion” to disqualify Mr. Cassell, since it was likely that he was simultaneously negotiating the terms of his new employment with the firm that was representing Thornhill.<sup>221</sup> This holding flows from Rule 1.11(c)(2) of the West Virginia Rules of Professional Conduct, which states, in part, that a lawyer serving as a public officer or employee shall not: “negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.”

However, nothing in the Rules of Professional Conduct would have prevented the second board member from serving as the Board’s attorney in the matter of Thornhill’s CUP application, even had he represented Thornhill in a previous matter. Rule 1.9 of the West Virginia Rules of Professional Conduct requires only that “a lawyer who has formerly represented a client in a matter shall not thereafter represent another person *in the same or substantially related matter*, if the person’s interests are materially adverse to the interests of the former client, and unless the former client does not consent after consultation.” Since the CUP application is not the same or substantially related to the adverse

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<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *State ex rel. Jefferson Cty Bd. of Zoning Appeals v. Wilkes*, 655 S.E.2d 178 (W. Va. 2007).

<sup>221</sup> *Rissler*, 693 S.E.2d at 332 (citing *Wilkes*, 655 S.E.2d at 180).

possession case in which the second board member represented Thornhill, he could later have represented the Board as its attorney in the CUP application.<sup>222</sup> Nevertheless, the court, even though it recognized that the second board member was not serving as an attorney but as a private citizen as a member of the Board, ruled that he should have been disqualified from serving on the Board reviewing the CUP application, emphasizing again that “‘even the probability of unfairness’ should be avoided to ensure that the hearing before an impartial tribunal guaranteed by due process has been afforded.”<sup>223</sup>

By insisting that even the appearance of an impropriety be avoided, *Rissler* undoubtedly is consistent with the letter and spirit of the holdings of the United States Supreme Court, and commendably recognizes that justice demands that litigants feel that they have received a fair trial before a fair tribunal, regardless of the outcome of their case. How, then, is it possible to square the holding in *Rissler* with the holdings in *Foster*, *Bayer MaterialScience*, and *Mountain America*? When a county commissioner makes it clear during a hearing on a taxpayer's protest that he is concerned with the county's fisc and the potential effect on the Board of Education if the taxpayer's appeal is successful, and then votes to deny the appeal, despite the taxing authority's witness admitting that he applied a “fairly arbitrary” methodology to value the taxpayer's property and that he had “no idea” whether that methodology accounted for its true and actual value, does the court really believe that the taxpayer feels that it received a fair trial before a fair tribunal? When the levying bodies and the county commissioners both directly profit from the rulings of the county commission adverse to the taxpayer, does the court really believe that the taxpayer feels that it received a fair trial before a fair tribunal? Does the court really believe that these tribunals are fair?

#### IV. THE ISSUE OF WHETHER THE CLEAR AND CONVINCING STANDARD OF PROOF BEFORE A BOARD OF EQUALIZATION AND REVIEW VIOLATES DUE PROCESS

While both Bayer and the Foster Foundation objected to the standard of proof applicable in their hearings before their respective boards of equalization and review, their arguments were significantly different. Bayer pointed out that there were divergent lines of cases from the West Virginia Supreme Court of

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<sup>222</sup> In fact, while the Court observed that the interests of Thornhill and the Board “may coincide in connection with specific issues that arise in the CUP application process,” it also observed that “the interests of the two are not generally aligned” and speculated that their interests “on any given issue be in sharp conflict” because Thornhill “wants to get a permit; whereas the BZA wants to follow the law and serve the best interests of the people of Jefferson County—whether Thorn Hill gets a permit or not.” Since the Court failed to identify any issue on which the interests of Thornhill and the Board were definitely adverse, it's not even clear that Rockwell couldn't have represented the Board in the CUP application process had he represented Thornhill earlier in the same process, as long as Thornhill didn't object. See *Rissler*, 693 S.E.2d at 331.

<sup>223</sup> *Rissler*, 693 S.E.2d at 331 (quoting *In re Murchison*, 349 U.S. 133, 136 (1995)).

Appeals. In some cases, the court has held that the standard of proof that a taxpayer must meet before a board of equalization and review is a simple preponderance of the evidence, while in others, that court has held that the higher clear and convincing evidence standard is applicable. Bayer argued both that the court's earlier cases holding that the preponderance of the evidence standard of proof before a board of equalization and review were well reasoned and that the divergence in the case law occurred only in later cases where the court was not careful to distinguish between the standard of proof before a board of equalization and review and the standard of judicial review on appeal to a circuit court. Bayer also argued that the clear and convincing standard of proof *per se* before a board of equalization and review was a denial of due process in that it denied to taxpayers their right to a fair and unbiased hearing at the first adjudicative level.

The Foster Foundation did not assert that the clear and convincing standard of proof *per se* constituted a denial of due process; rather, it asserted that it is inherently unfair to require a taxpayer to meet that standard of proof by bearing the expense of hiring a licensed, professional appraiser with the requisite training and experience to appraise a complex property such as the Woodlands, while permitting the Assessor to use unlicensed personnel to appraise such property. In addition, in *Foster*, the Foundation objected to the fact that the Assessor was not required to, and in fact did not, provide any written evidence as to what information it had obtained and considered in reaching its valuation and as to the methodology used, or to otherwise show how he determined the fair market value of the property. In that case, the Board didn't accept either the Assessor's or the taxpayers' value; rather, it set the value of the property at a value in between those extremes. The Foster Foundation also objected to the fact that there was no evidence introduced that supported the value arrived at by the Board or that explained how it was derived.

In its decision in *Foster*, the court both addressed its own inconsistent case law, holding that the clear and convincing standard of proof is applicable before a board of equalization and review, and found that standard of proof did not violate due process. In fact, the court had no reason to address these issues since none of the parties raised them in the *Foster* case, but by doing so, it was again able to avoid having to refute any of the support Bayer offered for its arguments.

A. *The Court had No Reason to Reach the Question of the Proper Standard of Proof in Foster*

One of the Foundation's complaints was that it never "received any written report (nor has any written report ever been submitted into evidence) detailing how either the Assessor or the County Commission arrived at their

respective valuations of Woodlands.”<sup>224</sup> As the County Commission itself recognized, “[t]he West Virginia Tax Commissioner has adopted regulations which Assessors must follow in order to determine the market value of real property.”<sup>225</sup> These technical rules require the use of generally accepted appraisal practices.<sup>226</sup> It would therefore be impossible for anyone to objectively determine whether the Assessor’s appraisal conformed to the Tax Commissioner’s rules without seeing how it was performed, and the Foundation’s objection to the lack of evidence was well taken.

### 1. The Assessor in *Foster* Did Not Meet His Burden of Proof

At one point in its history, the West Virginia Supreme Court of Appeals might well have found, under these circumstances, that the Assessor in *Foster* did not meet his standard of proof, no matter what the applicable standard. In *In re Tax Assessments Against Pocahontas Land Co.*,<sup>227</sup> the court restated the general rule that “valuations for taxation purposes fixed by an assessing officer are presumed to be correct,” affirmed that the burden to prove an assessment is erroneous is “of course, upon the taxpayer,” and imposed a heightened standard of proof on the taxpayer, stating that “and proof of such fact must be clear.”<sup>228</sup> Even under those onerous standards, however, the court held that the taxing authority also has a corresponding burden:

It is obvious that where a taxpayer protests his assessment before a board, he bears the burden of demonstrating by clear and convincing evidence that his assessment is erroneous. *Once this is done, it is incumbent upon the taxing authority to place some evidence in the record to show why its assessment is correct.*<sup>229</sup>

In *Pocahontas Land*, the Board ignored the Assessor’s appraised value and arbitrarily substituted a higher value without explaining how they arrived at that value. After noting that “it is apparent that no one was present to support or protect the Board’s increase in assessment values,”<sup>230</sup> the court affirmed the

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<sup>224</sup> Brief of Appellant at 7, *In re Tax Assessment of the Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 152 (W. Va. 2008) (No. 07-C-214).

<sup>225</sup> Brief of Appellee at 1, *In re Tax Assessment of the Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 152 (W. Va. 2008) (No. 07-C-214) (citing W. VA. CODE R. 110. § 1P-1, *et seq.*).

<sup>226</sup> W. VA. CODE R. 110 § 1P-2-2.

<sup>227</sup> 303 S.E.2d 691 (W. Va. 1983).

<sup>228</sup> *Id.* at 699 (quoting *In re Tax Assessment Against the Nat’l Bank of W. Va.*, 73 S.E.2d 655, 664 (W. Va. 1952)).

<sup>229</sup> *Id.* (emphasis added).

<sup>230</sup> *Id.*



circuit court's decision to vacate the Board's values and to use the values for the preceding year instead.<sup>231</sup>

In *Foster* then, it was not necessary to even reach the constitutional issue as to the standard of proof. Rather, on February 22, 2007, the County Commission entered an Order reducing the appraised value of the Woodlands to \$29,759,000 for tax year 2007 *without explanation*. This value was far in excess of the appraised value of \$14,900,000 arrived at by the Foster Foundation's appraiser and far less than the Assessor's initial valuation of \$38,137,300.00.<sup>232</sup> Just as in *Pocahontas Land*, there was no support for the value arrived at by the Board<sup>233</sup> and absolutely no indication of what "generally accepted appraisal practice" (if any) the Board or the Assessor employed to reach its conclusion of value.<sup>234</sup> On the basis that the Assessor and Board failed to meet their burden of production, *Pocahontas Land* should have mandated that the court in *Foster* reverse the decision of the circuit court to uphold the Board's value. Indeed, in a subsequent case, *Stone Brooke Limited v. Sisinni*,<sup>235</sup> the court established a new syllabus point<sup>236</sup> mandating that

[w]hen a circuit court reviews an appraisal of commercial real property made for ad valorem taxation purposes, the court shall, in its final order, make findings of fact and conclusions of law addressing the assessing officer's consideration of the required

<sup>231</sup> *Id.* at 694 (noting that "the circuit court concluded that the procedures before the Board were so inadequate as to require vacating the Board's new appraisal figure of \$300 an acre and the court directed that the preceding year's figures be used").

<sup>232</sup> It was uncontroverted that on January 2, 2007, the Cabell County Assessor's Office notified the Foster Foundation that for the tax year 2007 the assessed value of the Woodlands would be based upon an appraised value of \$38,137,300.00. *See* Brief of Appellee at 2, *In re Tax Assessment of the Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 152 (W. Va. 2008) (No. 07-C-214); Brief of Appellant at 2, *In re Tax Assessment of the Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 152 (W. Va. 2008) (No. 07-C-214).

<sup>233</sup> In its brief, the Foster Foundation observed that "the record reveals that the value adopted by the County Commission is approximately the amount of insurance that Foster Foundation testified that it carried in response to a question from the County Commission." Brief of Appellant at 6, *In re Tax Assessment of the Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 152 (W. Va. 2008) (No. 07-C-214).

<sup>234</sup> In the Appellant's reply brief, the Foundation states: "To date, the Foster Foundation has not received any written report (nor has any written report ever been submitted into evidence) detailing how either the Assessor or the County Commission arrived at their respective valuations of Woodlands. In their Brief, the only "evidence" from the entire record that the County Commission could point to was an oral statement made by Mr. Daniels at the February 9, 2007 hearing wherein he stated that he had compared the Woodlands to the Courtyard Apartments in Cabell County, West Virginia and the Maplewood facility in Harrison County, West Virginia. These two comparables are discussed in greater detail in Section II herein." Brief of Appellant at 7, *In re Tax Assessment of the Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 152 (W. Va. 2008) (No. 07-C-214).

<sup>235</sup> 688 S.E.2d 300 (W. Va. 2009).

<sup>236</sup> *Id.* at Syl. pt. 7.

appraisal factors set forth in W. Va. C.S.R. §§ 110-1P-2.1.1 to 2.1.4 (1991).

Had this syllabus point been in effect when *Foster* was decided, the case would at least have to have been remanded to the circuit court for more detailed fact finding, and the Assessor and County Commission would have been required to fully support their appraised value.

2. The Issue as to Whether the Clear and Convincing Standard of Proof Per Se Violates Due Process Should Have Been Addressed In *Bayer MaterialScience*, Not *Foster*

In its Petition for Appeal in the Circuit Court, the Foster Foundation included this assignment of error:

The Foster Foundation assigns as error that an employee of the county, who is not a licensed real estate appraiser as required by West Virginia law, can assess the value of a taxpayers' real property and then place the burden on the taxpayer to rebut the assessed value by hiring a duly licensed real estate appraiser under West Virginia law. The presumption of validity given to an unlicensed real estate appraiser's assessed value breaches the due process safeguards afforded the taxpayers of the State of West Virginia and improperly frustrates the purpose of West Virginia Code section 11-3-1 of appraising real property at its fair market value.<sup>237</sup>

This argument is significantly different from Bayer's assertion in its Petitions for Appeal for the 2007 tax year that "the imposition of a clear and convincing standard of proof upon the taxpayer also constitutes a denial to the taxpayer of due process of law."<sup>238</sup> Since, unlike Bayer, the Foster Foundation didn't argue that the clear and convincing standard of proof *per se* was unconstitutional in the circuit court, the circuit court, not surprisingly, didn't address that issue in a meaningful fashion in its final decision. Rather, the court simply concluded as a matter of law:

The West Virginia Supreme Court on several different occasions has stated that the law presumes the Assessor's valuations to be correct and places the burden of proving an incorrect assessment before the Board of Equalization and Review on the taxpayer. These decisions hold that the taxpayer must prove *by*

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<sup>237</sup> See *Foster*, 672 S.E.2d at 156 n.12.

<sup>238</sup> See Petition for Appeal ¶ 52, *Bayer MaterialScience, LLC v. State Tax Commissioner*, 672 S.E.2d 174 (W. Va. 2008) (No. 07-MISC-105).

*competent evidence* that the Assessor or the Tax Commissioner arrived at an incorrect value.<sup>239</sup>

The circuit court's conclusion that the taxpayer must prove that the Assessor's value *by competent evidence* seems to have been carefully chosen to avoid specifying a specific standard, since the court then cited three cases, each of which defines a different standard of proof: "by a preponderance of the evidence,"<sup>240</sup> "proof must be clear,"<sup>241</sup> and "by clear and convincing evidence."<sup>242</sup> Indeed, the *Foster* court correctly observed that "the [circuit] court did not specifically rule upon the constitutionality of the clear and convincing burden of proof imposed upon taxpayers appealing allegedly erroneous tax assessments."<sup>243</sup>

By the *Louk v. Cormier* rule discussed in the previous section, this issue should not even have been addressed by the court in *Foster*, because at the very least it was deprived of the "wisdom of the Circuit Court."<sup>244</sup> Moreover, since the *Foster* Foundation didn't argue the issue at any stage, the court was also deprived of any analysis by the parties. By contrast, the issue of whether the imposition of a clear and convincing standard of proof constitutes a denial of due process of law was fully briefed in *Bayer MaterialScience* by the parties, both before the circuit court and in the West Virginia Supreme Court, and the circuit judge specifically addressed that issue in his final decision in the appeals for tax year 2007.<sup>245</sup>

It seems clear, then, that the court would decline to address the issue of whether the clear and convincing standard *per se* constitutes a denial of due process in *Foster* and to have taken up that issue in *Bayer MaterialScience*. Instead, the court did exactly the opposite, and it did so without specifically

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<sup>239</sup> Final Order at 3, *In re Tax Assessment of Foster Found.* Woodlands Ret. Cmty., 672 S.E.2d 150 (W. Va. 2008) (No. 07-C-214).

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *W. Pocahontas Prop. v. Cnty. Comm'n*, 431 S.E.2d 661 (W. Va. 1993).

<sup>243</sup> *In re Tax Assessment of Foster Found.* Woodlands Ret. Cmty., 672 S.E.2d 150, 161 (W. Va. 2008).

<sup>244</sup> See *Whitlow v. Bd. of Educ.*, 438 S.E.2d 15 (W. Va. 1993).

<sup>245</sup> See Final Order Finding of Fact No. 33, *Bayer MaterialScience, LLC v. State Tax Commissioner*, 672 S.E.2d 174 (W. Va. 2008) (No. 07-MISC-106) ("Petitioners assert that the Board is an inherently biased tribunal and that imposing a 'clear and convincing' standard of proof upon a taxpayer before that tribunal amounts to a denial of due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States and Article III, Section 10 of the Constitution of West Virginia"); see also Final Order Conclusion of Law No. 3, *BayerMaterialScience*, 672 S.E.2d 174 ("The Court concludes that there is no merit to Petitioners' allegations that they were denied due process. The legislatively mandated system to equalize and review the assessments is set forth in West Virginia Code § 11-3-24, and the Board properly followed the statutes and properly applied the burden of proof to Petitioners' case.").

addressing Bayer's support for its arguments. Then, it rendered a *per curiam* decision in the *Bayer* case, thereby avoiding Bayer's arguments entirely.

### B. Existing Law on Permissible Standards of Proof

Even if it elected to strike out on its own without the benefit of input from the court below or from the parties, the West Virginia Supreme Court should have discovered that there was no shortage of case law from the Supreme Court of the United States, other jurisdictions, and its own prior cases to guide its deliberations. Since any such analysis is entirely missing from the decision in *Foster*, however, this article will attempt to provide the basis for a meaningful evaluation of the issue.

#### 1. Supreme Court of the United States Cases on the Standard of Proof

The Supreme Court of the United States held in *Mathews v. Eldridge*<sup>246</sup> that "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."<sup>247</sup>

Because the exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause.<sup>248</sup> As that Court's cases reveal, the appropriate standard of proof is an essential element of due process analysis.

The Court explained in *Addington v. Texas*<sup>249</sup> that the function of a standard of proof is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."<sup>250</sup> The standard of proof serves to allocate the risk of error between the litigants and to indicate the relative importance society attaches to the ultimate decision.<sup>251</sup>

The Court recognized that

the evolution of this area of the law has produced across a continuum three standards or levels of proof for different types of

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<sup>246</sup> 424 U.S. 319 (1976).

<sup>247</sup> *Id.* at 332.

<sup>248</sup> *McKesson Corp. v. Div. of Alcoholic Beverages* 496 U.S. 18, 36–37 n.17 (1990) (citing *Mathews*, 424 U.S. at 347–48) ("This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest"); *Cent. of Ga. R. Co. v. Wright*, 207 U.S. 127 (1907); *Davidson v. New Orleans*, 96 U.S. 97, 104–105 (1878).

<sup>249</sup> 441 U.S. 418 (1979).

<sup>250</sup> *Id.* at 423 (citing *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

<sup>251</sup> *Id.*

cases. At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion.

In a criminal case, on the other hand, the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt.<sup>252</sup>

The Court also recognized that the intermediate standard between those two extremes, although less commonly used, "is no stranger to the civil law."<sup>253</sup> As an example of the typical use of the intermediate standard, it cited civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. In those cases, the Court recognized that "[t]he interests at stake in those cases are deemed to be *more substantial than mere loss of money* and some jurisdictions accordingly reduce the risk to the defendant *of having his reputation tarnished erroneously* by increasing the plaintiff's burden of proof."<sup>254</sup>

In *Santosky v. Kramer*,<sup>255</sup> the Court explained that it

has mandated an intermediate standard of proof—"clear and convincing evidence"—when the individual interests at stake in a state proceeding are both "particularly important" and "more substantial than mere loss of money." Notwithstanding "the state's 'civil labels and good intentions,'" the Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with "a significant deprivation of liberty" or "stigma."<sup>256</sup>

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<sup>252</sup> *Id.* at 423–24.

<sup>253</sup> *Id.* at 424 (citing *Woodby v. Immigration and Naturalization Serv.*, 385 U.S. 276 (1966)).

<sup>254</sup> *Id.*

<sup>255</sup> 455 U.S. 745 (1982).

<sup>256</sup> *Id.* at 756 (citations omitted).

There, the Court ruled that the fundamental liberty interest of natural parents in the care, custody, and management of their child; their vital interest in preventing the irretrievable destruction of their family life; and a natural parent's "desire for and right to 'the companionship, care, custody, and management of his or her children'" requires a more stringent standard of proof to terminate these rights.<sup>257</sup> Other cases in which the individual's liberty interest requires a standard of proof higher than a preponderance of the evidence include those involving involuntarily civil commitment for an indefinite period of time, due in part to adverse social consequences,<sup>258</sup> and actions to determine juvenile delinquency,<sup>259</sup> deportation,<sup>260</sup> and denaturalization.<sup>261</sup> Also, the Court has ruled that a person has a constitutionally protected liberty interest in refusing unwanted medical treatment; nevertheless, requiring a third party who seeks to terminate life-sustaining treatment to demonstrate by clear and convincing evidence that the incompetent person receiving such treatment would wish that step to be taken is permissible.<sup>262</sup>

## 2. Prior West Virginia Cases on the Standard of Proof

The West Virginia Supreme Court in *Foster* purported to "look to analogous decisions and bodies of law for further counsel"<sup>263</sup> and observed that "[i]n this Court's jurisprudence, we have repeatedly applied and upheld the clear and convincing *burden* of proof in a variety of contexts,"<sup>264</sup> citing no fewer than eleven cases in which it has sanctioned the use of that *standard* of proof. Had the West Virginia Supreme Court of Appeals more closely examined these cases, it would have discovered that it has often engaged in the same type of analysis as has the Supreme Court of the United States, and its cases have yielded similar results.

While under West Virginia law, "the preponderance standard applies across the board in civil cases,"<sup>265</sup> the heightened clear and convincing standard is applicable only "in certain classes of cases, such as those involving either charges of fraud or undue influence, or of mistake sufficient to justify reforma-

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<sup>257</sup> *Id.* at 758.

<sup>258</sup> *Addington v. Texas*, 441 U.S. 418, 427 (1979).

<sup>259</sup> *In re Winship*, 397 U.S. 358 (1970).

<sup>260</sup> *Woodby v. Immigration and Naturalization Serv.*, 385 U.S. 276 (1966).

<sup>261</sup> *Chaunt v. United States*, 364 U.S. 350 (1960); *Schneiderman v. United States*, 320 U.S. 118 (1943).

<sup>262</sup> *Cruzan v. Dir. Mo. Dept. of Health*, 497 U.S. 261 (1990).

<sup>263</sup> *In re Tax Assessment of Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 166 (W. Va. 2008).

<sup>264</sup> *Id.* at 167 (emphasis added).

<sup>265</sup> *Brown v. Gobble*, 474 S.E.2d 489, 494 (W. Va. 1996); *see, e.g., McClure v. McClure*, 403 S.E.2d 197, 201 (W. Va. 1991) ("A preponderance, of course, is our traditional burden of proof in a civil case.").

tion of a contract or written instrument,”<sup>266</sup> and only in cases “where fairness and equity require more persuasive proof.”<sup>267</sup>

The cases cited by the West Virginia Supreme Court in *Foster* fall clearly into one of those two categories. Those involving unique fairness and equity concerns that the West Virginia Supreme Court has found “require more persuasive proof” include:

- At a hearing on a petition to remove a child from parental custody based upon allegations of child abuse and neglect and to establish infant guardianship with grandparents, “allegations of child abuse and neglect [against the parent(s)] must be proven by clear and convincing evidence.”<sup>268</sup>
- Under Rule 3.7 of the Rules of Lawyer Disciplinary Procedure, the Office of Disciplinary Counsel is required to prove formal allegations of lawyer misconduct by clear and convincing evidence.<sup>269</sup>
- In an action for libel and defamation, plaintiffs who are public officials or public figures (including limited purpose public figures) must prove by clear and convincing evidence that the defendants made their defamatory statement with knowledge that it was false or with reckless disregard of whether it was false or not; by contrast, private figures need only show that the defendants were negligent in publishing the false and defamatory statement.<sup>270</sup>
- When there is a failure on the part of an insurer to settle within policy limits where there exists the opportunity to so settle and where such settlement within policy limits would release the insured from any and all personal liability, that the insurer has *prima facie* failed to act in its insured's best interest and that such failure to so settle *prima facie* constitutes bad faith towards its insured. It is “the insurer's burden to prove by clear and convincing evidence that it attempted in good faith to negotiate

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<sup>266</sup> Lutz v. Orinick, 401 S.E.2d 464, 467 (W. Va. 1990).

<sup>267</sup> Brown, 474 S.E.2d at 494 (citing 2 MCCORMICK ON EVID. § 340 (Strong ed., 1992)).

<sup>268</sup> See, e.g., *In re Abigail Faye B.*, 665 S.E.2d 300, 310 (W. Va. 2008); see also *In re S.C.*, 284 S.E.2d 867, 871 (W. Va. 1981) (“In a child abuse or neglect case the burden of proof under West Virginia Code § 49-6-2 [2010], is upon the State Department of Welfare [now the Department of Health and Human Resources] to show by clear and convincing proof that conditions existing at the time of the filing of the petition constituted neglect or abuse.”).

<sup>269</sup> See *Lawyer Disciplinary Bd. v. McGraw*, 461 S.E.2d 850 (W. Va. 1995).

<sup>270</sup> See *State ex rel. Suriano v. Gaughan*, 480 S.E.2d 548 (W. Va. 1996).

a settlement, that any failure to enter into a settlement where the opportunity to do so existed was based on reasonable and substantial grounds, and that it accorded the interests and rights of the insured at least as great a respect as its own.”<sup>271</sup>

Note that in the first two cases in this category in which the action is government-initiated, the heightened burden is imposed on the state, not the individual. This is consistent with the decision in *Santosky v. Kramer*.<sup>272</sup> In the other two cases in this category, the heightened burden of proof is imposed on the public figure or insurance company, not on the individual opposing them.

Only in those cases that involve “fraud or undue influence, or of mistake sufficient to justify reformation of a contract or written instrument” has the West Virginia Supreme Court sanctioned imposing a heightened burden on an individual:

- “The burden of proving an easement rests upon the party claiming such right and must be established by clear and convincing proof.”<sup>273</sup>
- A party seeking to challenge a settlement agreement reached in a proceeding to partition real property “must allege and prove by clear and convincing evidence that an accident, mistake or fraud occurred” in making the settlement agreement.<sup>274</sup>
- “A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable *notwithstanding the Statute of Frauds* if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.”<sup>275</sup> The court should consider “the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by *clear and convincing evidence*.”<sup>276</sup>

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<sup>271</sup> *Shamblin v. Nationwide Mut. Ins. Co.*, 396 S.E.2d 766, 776 (W. Va. 1990).

<sup>272</sup> 455 U.S. 745 (1982).

<sup>273</sup> Syl. pt. 1, *Berkeley Dev. Corp. v. Hutzler*, 229 S.E.2d 732, 733 (W. Va. 1976), *overruled by* *O'Dell v. Stegall*, 703 S.E.2d 561 (W. Va. 2010).

<sup>274</sup> *McConaha v. Rust*, 632 S.E.2d 52, 59 (W. Va. 2006).

<sup>275</sup> Syl. pt. 1, *Everett v. Brown*, 321 S.E.2d 685 (W. Va. 1984).

<sup>276</sup> Syl. pt. 3, *Everett*, 321 S.E.2d at 685 (emphasis added).



- To justify the reformation of a clear and unambiguous deed for mistake, the mistake must be mutual and common to both parties to the deed, the unambiguous deed must fail to express the obvious intention of the parties, and the mutual mistake must be proved by strong, clear and convincing evidence.<sup>277</sup>

- The question is whether or not a juror has been subjected to improper influence affecting the verdict is a fact primarily to be determined by the trial judge from the circumstances, which must be clear and convincing to require a new trial; proof of mere opportunity to influence the jury being insufficient.<sup>278</sup>

These outcomes are also consistent with the United States Supreme Court's observation that the clear and convincing "level of proof, 'or an even higher one, has traditionally been imposed in cases involving allegations of civil fraud, and in a variety of other kinds of civil cases involving such issues as . . . lost wills, oral contracts to make bequests, and the like.'"<sup>279</sup>

Since only property and not liberty interests are at stake in a valuation appeal, there is likely no constitutional requirement to impose a heightened standard of proof *on the state* in those cases. Just as clearly, however, the West Virginia Supreme Court failed to identify in the *Foster* or *Bayer Material Science* cases any societal interest similar to that in its other cases involving fraud or undue interest that would justify imposing the clear and convincing standard of proof on the *taxpayer* in a valuation appeal. This is especially true considering that the taxpayer is required to pay the contested tax and then to institute action to recover the disputed amount. Since the taxing authority already has the amount in controversy in its possession, it is difficult to identify a societal interest that would justify applying a heightened standard of proof on the individual.

### 3. The Heightened Standard of Proof in Tax Cases

The Supreme Court of the United States has, however, sanctioned the imposition of a heightened standard of proof on taxpayers in a narrow class of cases. In the first of these cases addressing the heightened standard, the Court in *Norfolk & Western Railway. Co. v. North Carolina ex rel. Maxwell* (*Norfolk v. North Carolina*)<sup>280</sup> stated that it has consistently held that an apportionment "formula not arbitrary on its face or in its general application may be unworka-

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<sup>277</sup> See *Smith v. Smith*, 639 S.E.2d 711 (W. Va. 2006).

<sup>278</sup> See *State v. Johnson*, 164 S.E. 31 (W. Va. 1932).

<sup>279</sup> *Cruzan v. Dir. Mo. Dept. of Health*, 497 U.S. at 282–83, (citing *Woodby v. Immigration and Naturalization Serv.*, 385 U.S. at 285, n.18).

<sup>280</sup> 297 U.S. 682 (1936).

ble or unfair when applied . . . in particular conditions.”<sup>281</sup> It defined when a heightened standard was permissible:

A finding that the statute, though fair upon its face, is oppressive toward the railway in its practical operation cannot rest upon so fragmentary and partial a showing of facts. We must bear in mind steadily that the burden is on the taxpayer to make oppression manifest by *clear and cogent evidence*.<sup>282</sup>

The “clear and cogent evidence” standard has been used by the Court in cases since *Norfolk v. North Carolina* was decided. Each of those cases involves a constitutional challenge, under the Commerce Clause and Due Process Clause, to a state’s apportionment of sales or income tax (specifically, the “external consistency,” or second component of fairness, of an apportionment formula). Each case holds that the party challenging the constitutionality of a duly enacted statutory apportionment tax must meet a higher burden, that the income attributed to the state is out of proportion to the business transacted in that state, or has led to a grossly distorted result.<sup>283</sup>

According to the Court, a constitutional challenge to a state’s tax apportionment statute faces a higher standard of proof because every state has “wide latitude in the selection of apportionment formulas,”<sup>284</sup> and “[t]he difficulty of making an exact apportionment is apparent . . . hence, when the state has adopted a method not intrinsically arbitrary, it will be sustained until proof is offered of an unreasonable and arbitrary application in particular cases.”<sup>285</sup> The Court has explained that

[T]his Court has long realized the practical impossibility of a state’s achieving a perfect apportionment of expansive, complex business activities such as those of appellant, and has declared that rough approximation rather than precision is sufficient. Unless a palpably disproportionate result comes from an apportionment, a result which makes it patent that the tax is levied upon interstate commerce rather than upon an intrastate privi-

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<sup>281</sup> *Id.* at 685.

<sup>282</sup> *Id.* at 688 (emphasis added) (citing *Maxwell v. Kent-Coffey Mfg. Co.*, 168 S.E. 397 (1933), *aff’d* 291 U.S. 642 (1934); *Bass, Ratcliff & Gretton, Ltd., v. State Tax Comm’n*, 266 U.S. 271, 280, 283 (1924); *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 121 (1920)). Interestingly, none of these cases refer to a “clear and cogent” standard of proof.

<sup>283</sup> See *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 195–96 (1995); *Trinova Corp. v. Mich. Dep’t. of Treasury*, 498 U.S. 358, 379–80 (1991); *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169–70 (1983); *Exxon Corp. v. Wisc. Dept. of Revenue*, 447 U.S. 207, 221–22 (1980); *Mobil Oil Corp. v. Comm’r of Taxes of Vt.*, 445 U.S. 425, 453–54 (1980).

<sup>284</sup> *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 274 (1978).

<sup>285</sup> *Hans Rees’ Sons v. N.C. ex rel. Maxwell*, 283 U.S. 123, 133 (1931).

lege, this Court has not been willing to nullify honest state efforts to make apportionments.<sup>286</sup>

#### 4. West Virginia Decisions Have Been Consistent with These Apportionment Cases

The West Virginia Supreme Court of Appeals first cited *Norfolk & Western Railway Co. v. North Carolina ex rel. Maxwell*<sup>287</sup> (*Norfolk v. North Carolina*) in *Norfolk & Western Railway Co. v. Field*<sup>288</sup> (*Norfolk v. Field*). This case involved a challenge under the Due Process and Commerce Clauses by a railroad operating in West Virginia and several contiguous states to a West Virginia privilege tax. The taxpayer claimed, *inter alia*, that the amount of the tax imposed constituted a direct burden on interstate commerce, since the amount of the tax imposed was several times greater than the gross income from its West Virginia business, which necessitated the payment of the tax from earnings from its interstate business.<sup>289</sup> Since this was a challenge to an apportionment formula, it was entirely reasonable for the West Virginia Supreme Court to cite it for the proposition that “[a] formula not arbitrary on its face or in its general operation may be unworkable or unfair when applied to a particular railway in particular conditions”<sup>290</sup> and that

[a] finding that the statute, though fair upon its face, is oppressive toward the railway in its practical operation cannot rest upon so fragmentary and partial a showing of facts. We must bear in mind steadily that the burden is on the taxpayer to make oppression manifest by clear and cogent evidence.<sup>291</sup>

Likewise, the West Virginia Supreme Court cited *Norfolk v. North Carolina* for the proposition that “[a] statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied”<sup>292</sup> seems entirely justified. In *Norfolk v. Field*, the taxpayer’s challenge fell short because he didn’t prove sufficient facts to prove his case.

Likewise, *Western Maryland Railway. Co. v. Goodwin*<sup>293</sup> also involved a constitutional challenge under the Due Process and Commerce Clauses of the

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<sup>286</sup> *Int’l. Harvester Co. v. Evatt*, 329 U.S. 416, 422–23 (1947) (citations omitted).

<sup>287</sup> 297 U.S. 682 (1936).

<sup>288</sup> 100 S.E.2d 796 (W. Va. 1957).

<sup>289</sup> *Id.* at 801.

<sup>290</sup> *Id.* at 803.

<sup>291</sup> *Id.* at 805.

<sup>292</sup> *Id.* at 807.

<sup>293</sup> 282 S.E.2d 240 (W. Va. 1981).

United States Constitution on the power of the state to tax interstate commerce. Here, when analyzing whether the tax was properly apportioned, the West Virginia Supreme Court cited *Norfolk v. North Carolina* for the proposition that “most of the time that a tax related to cargo or passenger miles traveled in state or to the miles of the line in state will be valid.”<sup>294</sup> There, the West Virginia Supreme Court reiterated that

for a taxpayer “to avoid a state tax under the Commerce Clause it is necessary to demonstrate sufficient duplication of taxation that there is an actual discrimination against interstate commerce.” The same burden was enunciated concerning apportionment and relation to services. But there, too, there was no serious effort factually to substantiate the constitutional claims. So here, too, we are left exasperated because “there is no development in this record of this particular question other than naked allegations.”<sup>295</sup>

In other West Virginia cases involving constitutional interstate commerce challenges under the Commerce and Due Process Clauses, the rule from *Norfolk v. North Carolina* seems also to have been appropriately employed.<sup>296</sup>

##### 5. Two West Virginia Tax Cases Misapplied the Rule from *Norfolk v. North Carolina*

However, in two West Virginia cases, this apportionment rule seems to have been taken out of context and misapplied. In *State ex rel. Haden v. Calco Awning & Window Corp.*<sup>297</sup> and *Schmehl v. Helton*,<sup>298</sup> the West Virginia Supreme Court relied in part on this rule to justify placing a heightened standard of proof on a taxpayer to prove that the application of a statute requiring corporate officers to be personally responsible for unpaid corporate Consumer Sales and Service Taxes is, as to them, unreasonable and arbitrary. Perhaps the imprecise wording of Syllabus Point 4 in *Norfolk v. Field* is partly to blame:

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<sup>294</sup> *Id.* at 244.

<sup>295</sup> *Id.* at 254–55.

<sup>296</sup> See *Chesapeake & Potomac Co. v. State Tax Dept.*, 239 S.E.2d 918, 926 (W. Va. 1977); *United Fuel Gas Co. v. Battle*, 167 S.E.2d 890, 899–902 (W. Va. 1969); *State ex rel. Battle v. Baltimore & Ohio Ry. Co.*, 143 S.E.2d 331, 338–40 (W. Va. 1965); *State ex rel. Battle v. B. D. Bailey & Sons, Inc.*, 146 S.E.2d 686, 701–04 (W. Va. 1965) (Haymond, J., dissenting) (citing *Norfolk & W. Ry. Co. v. North Carolina ex rel. Maxwell*, 297 U.S. 682 (1936); *Norfolk & W. Ry. Co. v. Field*, 100 S.E.2d 796 (W. Va. 1957)).

<sup>297</sup> 170 S.E.2d 362 (W. Va. 1969).

<sup>298</sup> 662 S.E.2d 697 (W. Va. 2008).

To establish that a taxing statute, valid on its face, is so unreasonable or arbitrary as to amount to a denial of due process of law when applied in a particular case, the taxpayer must prove by clear and cogent evidence facts establishing unreasonableness or arbitrariness.

Since this rule arose only in the context of challenges to apportionment mechanisms and was justified by the difficulty in making an exact apportionment, it should be apparent that the rule was never intended to apply to all “taxing statutes.” Moreover, since *State ex rel. Haden v. Calco Awning & Window Corp.* was decided before most of the Supreme Court of the United States’ cases concerning permissible standards of proof discussed above, it is understandable that the West Virginia Supreme Court was at least acting without that guidance. By the time *Schmehl v. Helton* was decided, however, it should have been apparent that, while it is permissible to place the burden of proof on the taxpayer, the imposition of a clear and convincing standard of proof may well be constitutionally impermissible. If one party must bear a heightened standard of proof in a proceeding where the state seeks to impose liability for corporate sales taxes on an individual, surely it is the state, not the individual, that should be required to bear that burden. And in valuation appeals, where the taxes have already been paid and the taxpayer is forced to bring an appeal to recover any excess paid, the State has even less justification for imposing a heightened standard.

6. *Concrete Pipe* Addresses the Issues in *Foster* and *Bayer MaterialScience*

In *Concrete Pipe*,<sup>299</sup> the Supreme Court of the United States addressed several issues that should have enlightened the deliberations of the West Virginia Supreme Court in *Foster*. There, the United States Supreme Court considered the constitutional concerns implicated by the selection of which party bears the burden of proof, as well as the constitutional limitations on the standard of proof.

a. The Issue of Who Bears the Burden of Proof

In *Concrete Pipe*, the federal statute at issue provided that “any determination made by a plan sponsor . . . is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.”<sup>300</sup>

The Court stated that

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<sup>299</sup> *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602 (1993).

<sup>300</sup> *Id.* at 611.

although we have observed that “[w]here the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application, . . . [o]utside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment.”<sup>301</sup>

It explained that

It is indeed entirely sensible to burden the party more likely to have information relevant to the facts about its withdrawal from the Plan with the obligation to demonstrate that facts treated by the Plan as amounting to a withdrawal did not occur as alleged. Such was the rule at common law.<sup>302</sup>

By this logic, neither Bayer nor the Foster Foundation would have had any reason to dispute the conclusion that, as a general rule, a taxpayer is more likely to have information relevant to the value of its property. And, in fact, neither complained that the fact that the taxpayer bears the *burden* of proof before a board of equalization and review.

#### b. The Issue of the Permissible Standard of Proof

After deciding that requiring the employer in *Concrete Pipe* to bear the burden of proof did not violate constitutional principles, the Court turned its attention to the standard of proof the employer was required to meet. The Court phrased the issue this way:

The hard question is what the employer must show under the statute to rebut the plan sponsor’s factual determinations, that is, how and to what degree of probability the employer must persuade the arbitrator that the sponsor was wrong. The question is hard because the statutory text refers to three different concepts in identifying this burden: “preponderance,” “clearly erroneous,” and “unreasonable.”<sup>303</sup>

The Court noted that a standard of proof “is customarily used to prescribe one possible burden or standard of proof before a trier of fact in the first instance, as when the proponent of a proposition loses unless he proves a contested proposition by a preponderance of the evidence,” while a standard of review is “customarily used to describe, not a degree of certainty that some fact

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<sup>301</sup> *Id.* at 626 (citing *Lavine v. Milne*, 424 U.S. 577, 585 (1976) (footnote omitted)).

<sup>302</sup> *Id.* (citations omitted).

<sup>303</sup> *Id.* at 621.

has been proven in the first instance, but a degree of certainty that a factfinder in the first instance made a mistake in concluding that a fact had been proven under the applicable standard of proof.”<sup>304</sup>

The Court observed that

[i]f the employer were required to show the trustees' findings to be either 'unreasonable or clearly erroneous', *there would be a substantial question of procedural fairness under the Due Process Clause*. In essence, the arbitrator provided for by the statute would be required to accept the plan sponsor's findings, *even if they were probably incorrect*, absent a showing at least sufficient to instill a definite or firm conviction that a mistake had been made.<sup>305</sup>

This observation well defines the height of the hurdle imposed by a more stringent standard of proof: under the lesser standard, if the arbitrator found the plan sponsor's findings to be probably incorrect, the arbitrator could reject them; under a more stringent standard, the arbitrator would nevertheless be required to accept them absent a definite or firm conviction that a mistake had been made.

The Court made clear that where possible bias on the part of the tribunal exists, applying a heightened standard of review would seem to deprive the challenging party “of the impartial adjudication in the first instance to which it is entitled under the Due Process Clause.”<sup>306</sup> In *Concrete Pipe*, the possible bias resulted from the employer's claim that the Plan's trustees (which the employer saw as being the first level adjudicative body) might be biased against it for several reasons, including the trustee's potential financial liability from breach of their fiduciary duty to the fund if they found in favor of an employer.<sup>307</sup>

In *Concrete Pipe*, the Court found that the employer had not been deprived of due process by the trustees, but only because they acted in an enforcement capacity, rather than an adjudicative capacity.<sup>308</sup> The trustees were not required to hold a hearing, to examine witnesses, or to adjudicate the disputes of contending parties on matters of fact or law.<sup>309</sup> Therefore, the hearing the employer received before the arbitrator constituted the first level adjudicative hearing, and to avoid the constitutional issue potentially raised by a heightened standard of proof at this level, the Court ruled that the statute's incoherent

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<sup>304</sup> *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622–23 (1993).

<sup>305</sup> *Id.* at 626 (emphasis added).

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at 615–16.

<sup>308</sup> *Id.* at 619.

<sup>309</sup> *Id.*

language required only the lower preponderance of the evidence standard of proof.<sup>310</sup>

Perhaps the most important conclusion to be gleaned from *Concrete Pipe* is that it is critically important to keep the distinctions between the “burden of proof”, the “standard of proof”, and the “standard of review” firmly in mind. Unfortunately, although it cited *Concrete Pipe*, the West Virginia Supreme Court of Appeals failed to do so.

C. *Problems with the West Virginia Supreme Court's Decision in Foster as to the Standard of Proof*

1. In *Foster*, the West Virginia Supreme Court Again Failed to Distinguish Between the Taxpayer's Burden Before a Board of Equalization and Review and On Appeal to a Circuit Court.

The West Virginia Supreme Court of Appeals failed to properly distinguish between the applicable standards of proof and standards of review. In the *Foster* decision, the West Virginia Supreme Court encountered this problem when it examined its own prior decisions and erroneously concluded that they were inconsistent with respect to the standard of proof applicable before a board of equalization and review.

As discussed above, the Foster Foundation never argued that the proper standard of proof before a county commission sitting as a board of equalization and review in a valuation dispute was by a preponderance of the evidence, rather than by clear and convincing evidence, and the circuit court skirted the issue by finding only that “the taxpayer must prove *by competent evidence* that the Assessor or the Tax Commissioner arrived at an incorrect value,”<sup>311</sup> and

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<sup>310</sup> See *id.* at 629 (citing *Machinists v. Street*, 367 U.S. 740, 749–50 (1961) (“Federal statutes are to be so construed as to avoid serious doubt of their constitutionality. ‘When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.’”). A similar line of reasoning should have led the West Virginia Supreme Court of Appeals to avoid the constitutional question by requiring only the lower standard. Where, as here, “a statute is susceptible of two constructions, one of which is, and the other of which is not, violative of a constitutional provision, the statute will be given that construction which sustains its constitutionality unless it is plain that the other construction is required.” *Farley v. Graney*, 119 S.E.2d 833, 840 (W. Va. 1960) (internal quotation marks and citation omitted); accord *State ex rel. Cosner v. See*, 42 S.E.2d 31, 43 (W. Va. 1947) (“[E]ffect must be given to the elementary rule that every reasonable construction must be resorted to in order to save a statute from unconstitutionality.”); *Gilbert Imported Hardwoods, Inc. v. Holland*, 176 F. Supp. 2d 569, 584 (S.D. W. Va. 2001) (quoting *Immigration and Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 299–300 (2001)) (“[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is ‘fairly possible,’ we are obligated to construe the statute to avoid such problems.”).

<sup>311</sup> *In re Tax Assessment of Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150 (W. Va. 2008).



cited cases in which has the West Virginia Supreme Court of Appeals specified three different standards.<sup>312</sup>

In *Foster*, the West Virginia Supreme Court justified its examination of the issue of the correct standard of proof before the Board by noting the differences in the standards in the cases cited by the circuit court:

While much of the law governing the Foundation's appeal is grounded in statutes, the burden of proof imposed upon the appealing taxpayer has not been established by the Legislature and thus has been defined by this Court. However, from the cases cited by the circuit court in its final order, it is apparent that a conflict of authority has been created by our prior inconsistent decisions: we have held both that the aggrieved taxpayer must prove his/her claim for relief by clear and convincing evidence and that the taxpayer must satisfy a preponderance of the evidence burden of proof.<sup>313</sup>

Observing that “[t]hese two burdens of proof differ vastly,”<sup>314</sup> it thereupon proceeded to reconcile its prior inconsistent case law. It did so by explicitly overruling, as was its prerogative, its prior cases holding that the preponderance of the evidence standard was applicable before a county commission sitting as a board of equalization and review and by issuing a new syllabus point adopting the clear and convincing standard of proof at the first-level adjudicatory hearing.<sup>315</sup>

By way of analysis, the West Virginia Supreme Court did little more than count the number of cases specifying which of the standards of proof was applicable. In doing so, however, it completely ignored Bayer’s assertion in its briefs that the West Virginia Supreme Court’s earliest cases do not, in fact, conflict with each other and are not inconsistent. In fact, the West Virginia Supreme Court has long recognized that a taxpayer who receives an adverse ruling from a county commission must carry a heavy burden in convincing *a circuit court* to overturn that determination.<sup>316</sup> It was not until 1982, however, when

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<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 161 (internal citations omitted).

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 163.

<sup>316</sup> See, e.g., *In re Nat’l Bank of W. Va. at Wheeling*, 73 S.E.2d 655, 687 (W. Va. 1952) (holding that assessments by the county commissions “should stand, unless there appears in the record some fact or facts which *clearly establish* the assessments to be erroneous”) (emphasis added)), *overruled on other grounds*, *In re Kanawha Val. Bank*, 109 S.E.2d 649 (W. Va. 1959); *Norfolk W. Ry. Co. v. Bd. of Public Works*, 21 S.E.2d 143, 147 (W. Va. 1942) (“In order for the courts . . . to reverse or to interfere with the exercise of the taxing power, there must be a *clear showing* of the arbitrary abuse of that power that amounts to a mala fides purpose to disregard the principle of uniformity, or of practical confiscation.”) (emphasis added)).

the West Virginia Supreme Court addressed the standard of proof applicable in proceedings before a county commission sitting as a board of equalization and review as the first adjudicatory and fact-finding tribunal.

In *Killen v. Logan County Commission*,<sup>317</sup> the West Virginia Supreme Court gave careful consideration to the burden of proof before a board of equalization and review. The West Virginia Supreme Court detailed the interaction of the initial determinations made by the assessor, the burdens placed on a party challenging an assessment before the Commission, and a court's subsequent review of a Commission's determinations. The court held: "[a]n objection to any assessment may be sustained only upon the presentation of competent evidence . . . [t]he objecting party . . . must show by a preponderance of the evidence that the assessment is incorrect."<sup>318</sup>

In *Killen*, the West Virginia Supreme Court recognized:

It is important to realize the difference in the burden of proof required in a *de novo* [fact-finding] proceeding and the standard of judicial review utilized by courts when considering appeals of assessments. West Virginia Code § 11-3-25 allows taxpayers to contest the proposed assessment value before the Board of Equalization and Review. The preponderance of the evidence standard would apply to that proceeding. . . . However, when the taxpayer has appeared before the Board of Equalization and Review, judicial review by the circuit court and by this Court will be limited.<sup>319</sup>

As Bayer explained, it is only cases decided after *Killen* that have given rise to the inconsistency addressed by the West Virginia Supreme Court in *Foster*, and in these cases, the court has not focused carefully on the distinction between the *standard of proof* before a board of equalization and review and the heightened *standard of review* that has applied to appellate review of a board's findings in circuit court.

The decision in *In re Tax Assessments Against Pocahontas Land Co.*<sup>320</sup> is illustrative. There, the West Virginia Supreme Court affirmed a circuit court's decision vacating the Commission's tax appraisal decision on due

<sup>317</sup> 295 S.E.2d 689 (W. Va. 1982), *overruled by In re Tax Assessment of Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 150 (W. Va. 2008).

<sup>318</sup> Syl. pt. 8, *Killen v. Logan Cnty. Comm'n*, 295 S.E.2d 689, 706 (W. Va. 1982); *see id.* at 709 (requiring "preponderance of competent evidence" shows that appraisal values are erroneous for Board to reduce or increase the value).

<sup>319</sup> *Id.* at 706 n.27. *See also* Frymier-Halloran v. Paige, 458 S.E.2d 780 (W. Va. 1995); *In re Tax Assessment Against Am. Bituminous Power Partners, L.P.*, 539 S.E.2d 757 (W. Va. 2000) (confirming constitutional limits on a circuit court's standard of review under the Separation of Powers provision of the West Virginia Constitution).

<sup>320</sup> 303 S.E.2d 691 (W. Va. 1983).

process grounds because the taxpayers “were denied a meaningful hearing before a proper quorum.”<sup>321</sup> After doing so, the Court noted the “general rule that valuations for taxation purposes fixed by an assessing officer are presumed to be correct,”<sup>322</sup> and “the burden of showing an assessment to be erroneous is, of course, upon the taxpayer and proof of such fact must be clear.”<sup>323</sup> Even though both of the cases quoted by the West Virginia Supreme Court address the standard of review applicable at the circuit court level, in the next sentence, stated in *dicta*: “It is obvious that where a taxpayer protests his assessment *before a board*, he bears the burden of demonstrating by clear and convincing evidence that his assessment is erroneous.”<sup>324</sup> That statement did not purport to distinguish or overrule, let alone acknowledge, the court’s contrary holding and syllabus point in *Killen*.

Subsequent cases, including *Western Pocahontas Properties, Ltd. v. County Commission*<sup>325</sup> and *In re Maple Meadow Min. Co. for Relief from Real Property Assessment*<sup>326</sup> rely without further analysis on that *obiter dictum* in *Pocahontas Land*. In *CSX Transportation, Inc. v. Board of Public Works*,<sup>327</sup> the district court recognized that the West Virginia Supreme Court had inconsistently applied the “preponderance evidence standard” from *Killen* and the “clear and convincing standard” from *Pocahontas Land*, and elected to apply the latter, citing *Maple Meadow* and *Western Pocahontas*. That decision, however, was reversed by the United States Court of Appeals for the Fourth Circuit, which held that the district court erred by failing to recognize that “preponderance of the evidence” standard of proof applied before a board of equalization and review and a higher standard of review is required upon appeal.<sup>328</sup>

In any event, in *Foster*, the West Virginia Supreme Court again failed to distinguish the entirely separate concepts of the standard of proof before a first-level adjudicatory tribunal and the standard of review applicable before a circuit court for an appeal, and, without acknowledging Bayer’s explanation as to how the inconsistency arose, the court expressly overruled *Killen* and *Eastern American Energy Corp. v. Thorn*<sup>329</sup> and held that a taxpayer challenging an assessor’s tax assessment before a board of equalization and review must prove by clear and convincing evidence that the tax assessment is erroneous.

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<sup>321</sup> *Id.* at 698–99.

<sup>322</sup> *Id.* at 699 (quoting *Bankers Pocahontas Coal Co. v. County Ct. of McDowell County*, 62 S.E.2d 801, 804 (W. Va. 1950)).

<sup>323</sup> *Id.* (quoting *In re Tax Assessments Against the Nat’l Bank of W. Va.*, 73 S.E.2d 655, 664 (1952) *overruled on other grounds*, *In re Assessment of Kanawha Valley Bank*, 109 S.E.2d (W. Va. 1959)).

<sup>324</sup> *Id.* (emphasis added).

<sup>325</sup> 431 S.E.2d 661 (W. Va. 1993).

<sup>326</sup> 446 S.E.2d 912 (W. Va. 1994).

<sup>327</sup> 871 F. Supp. 897, 899 (S.D. W. Va. 1995).

<sup>328</sup> 95 F.3d 318, 322–23 (4th Cir. 1996).

<sup>329</sup> 428 S.E.2d 56 (W. Va. 1993) (*per curiam*).

## 2. The West Virginia Supreme Court's Use of Imprecise Language Reflects Its Confusion of the Legal Issues

Having decided that the clear and convincing "burden" of proof was applicable before the Board, the West Virginia Supreme Court then turned its attention to the "parties' arguments regarding the constitutionality thereof."<sup>330</sup> After accurately describing in detail the parties' assertions on that score,<sup>331</sup> the court incorrectly summarized the Foster Foundations' position, stating that

On this point, the Foundation complains that the clear and convincing burden of proof it is required to sustain is unconstitutional. However, the Foundation's argument also challenges its corresponding burden of persuasion insofar as it complains that neither the Assessor nor the Commission was required to present evidence of a specific type to prove the correctness of their assessments.<sup>332</sup>

Since the West Virginia Supreme Court used the term "burden of proof" as meaning the applicable "standard of proof" throughout its discussion of its prior supposedly inconsistent case law, the court seems to assert here that the Foster Foundation argued that the clear and convincing *standard* of proof is *per se* unconstitutional, a claim that the Foster Foundation never argued or briefed. It also seems to introduce a new term, the "burden of persuasion," to address the only argument that the Foster Foundation actually made: that the disparate burdens of proof that the parties were required to make were unfair.

It is impossible to avoid the conclusion that the imprecise terminology used by the West Virginia Supreme Court actually reflects its confusion of the legal issues actually at issue. Because it failed to distinguish clearly between the issue of *which party bears the burden* from that of the requisite *degree of confidence* that the facts are true, it ends up citing many cases that actually stand for the proposition that it is proper for the party that is most likely to be in possession of the relevant facts to justify its conclusion that the heightened clear and convincing standard of proof is applicable. And because it failed to distinguish clearly between the concepts of *which party bears the burden of persuasion* from that of *which bears the burden of production*, it apparently believed that addressed the Foster Foundation's claim of the parties' disparate burdens being unfair, without actually having done so.

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<sup>330</sup> *In re Tax Assessment of Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 164 (W. Va. 2008).

<sup>331</sup> *Id.* at 164–65.

<sup>332</sup> *Id.* at 165.

a. The West Virginia Supreme Court Failed to Distinguish Between the Burden of Persuasion and the Burden of Production

The West Virginia Supreme Court explained that the “burden of proof” encompasses two separate and distinct concepts: the “burden of production” and the “burden of persuasion”;

The burden of persuasion requires the party upon whom it is placed, to convince the trier of fact . . . on a given issue. When a party has the burden of persuasion on an issue, that burden does not shift. The burden of production merely requires a party to present some evidence to rebut evidence proffered by the party having the burden of persuasion.<sup>333</sup>

Other authorities explain that the term “burden of production” instructs a court which party must come forward with evidence to support a particular proposition, whereas “burden of persuasion” determines which party must produce sufficient evidence to convince a judge that a fact has been established.<sup>334</sup> While the burden of production can shift (for example, after one party establishes a *prima facie* case, the burden of production shifts to the opposite party to disprove it), the burden of persuasion never leaves the party on whom it is originally cast.<sup>335</sup>

In *Pocahontas Land*, the court stated that

[i]t is obvious that where a taxpayer protests his assessment before a board, he bears the burden of demonstrating by clear and convincing evidence that his assessment is erroneous. Once this is done, it is incumbent upon the taxing authority to place some evidence in the record to show why its assessment is correct.<sup>336</sup>

This statement is consistent with the idea that the taxpayer has the burden of persuasion throughout the hearing before the board of equalization and review and initially bears the burden of production to show that the taxing authority’s assessment is excessive. Once the taxpayer establishes that fact, however, the burden of *production* shifts to the taxing authority to defend the accuracy of the

<sup>333</sup> *Id.* at 165 (citing *Mayhew v. Mayhew*, 519 S.E.2d 188, 195 n.15 (W. Va. 1999) (internal citations omitted)).

<sup>334</sup> 29 AM. JUR. 2D *Evidence* § 171 (2010); see also *McCann v. Newman Irrevocable Trust*, 458 F.3d 281 (3d Cir. 2006); *El v. S.E. Pa. Transp. Auth.*, 479 F.3d 232 (3d Cir. 2007).

<sup>335</sup> *In re Tax Assessment of Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 165 (W. Va. 2008) (quoting *Mayhew*, 519 S.E.2d at 195 n.15 (citations omitted); 29 AM. JUR. 2D *Evidence* § 171 (2010); *Hurley v. Hurley*, 754 A.2d 1283 (Pa. 2000)).

<sup>336</sup> *In re Tax Assessments Against Pocahontas Land Co.*, 303 S.E.2d 691, 699 (W. Va. 1983).

assessment. It is then for the factfinder to determine whether taxpayer ultimately met his burden of persuasion to show that the assessment was excessive.

As the West Virginia Supreme Court in *Foster* correctly explained in its summary of the parties' positions, the Foster Foundation only objected to the fact that the Assessor was not required to submit any specific evidence, is not required to be licensed, and submitted only oral testimony during the Board's hearing. Further, the Foundation objected to the fact that, during the circuit court proceedings, the County Commission did not provide any evidence to support the value that it adopted after the hearing before it, which was less than that submitted by the Assessor and higher than that submitted by the taxpayer.<sup>337</sup>

Clearly then, the *Foster* court's statement that "the Foundation's argument also challenges its corresponding *burden of persuasion* insofar as it complains that neither the Assessor nor the Commission was required to present evidence of a specific type to prove the correctness of their assessments,"<sup>338</sup> is incorrect. The Foster Foundation was actually complaining that after it met that burden of production, neither the Assessor nor the County Commission was required to meet their burdens of *production* as set forth in *Pocahontas Land*. The court's conclusion that "[t]he burden of persuasion rests with the Foundation to prove that its tax assessment was erroneous; it does not lie with the Assessor or the Commission nor does it shift thereto,"<sup>339</sup> is correct insofar as it goes, but it fails to get to the meat of the Foster Foundation's claim—that the Assessor failed to meet his *burden of production*.<sup>340</sup>

It is utterly unclear what the West Virginia Supreme Court is attempting to say here. Since neither the Foundation nor Bayer ever claimed that the burden of *persuasion* shifts to the taxing authority, this language seems to be completely unnecessary. If, on the other hand, the court believed it was addressing the Foster Foundation's complaint of disparate burdens of *production* and/or to overrule *Pocahontas Land*'s rule that the burden of *production* shifts to the taxing authority after the taxpayer *prima facie* establishes that the assessment is excessive, its statement that the burden of *persuasion* doesn't shift is wholly ineffective, especially after just having cited *Mayhew v. Mayhew* to explain those terms,<sup>341</sup> and given that if it was going to overrule *Pocahontas Land*, it

<sup>337</sup> *In re Tax Assessment of Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 164 (W. Va. 2008).

<sup>338</sup> *Id.* at 165 (emphasis added).

<sup>339</sup> *Id.*

<sup>340</sup> The Foster Foundation isn't alone in its belief that the disparate burdens of production are unfair. See, e.g., *Newport Hous. Auth., Inc. v. Hartsell*, 533 S.W.2d 317, 321–22 (Tenn. Ct. App. 1975) ("Something is wrong with our rules of evidence when a verdict can be predicated on the opinion of a person completely ignorant of real estate values and the opinions of skilled, knowledgeable, professional experts ignored. It is likened to taking the opinion of a midwife over that of an obstetrician.").

<sup>341</sup> See *Fischer v. Twp. of W. Bloomfield*, MTT Nos. 187567, 210379, 1996 WL 479591 (Mich. Tax Trib. 1996) ("Taxpayer's burden of establishing true cash value of property, in property tax matter, encompasses two separate concepts: burden of persuasion, which does not shift

would have done so explicitly, as it did for *Killen* and *Eastern American Energy Corp.*

It should also be noted that there never was an issue in *Foster* as to whether the taxpayer met its burden of persuasion, because the taxpayer met the conditions set by the Board for submitting clear and convincing evidence and provided an appraisal and the testimony of a licensed, professional appraiser in the hearing before the Board. Regardless of the correct standard of proof in that hearing, the taxpayer met it. What was at issue, however, was how much evidence the Assessor had to introduce to defend his appraisal. For the West Virginia Supreme Court to have provided no guidance at all on this question is not helpful to either the taxing authorities or to the members of the Bar practicing in this area. As noted earlier, the subsequent case of *Stone Brooke Limited Partnership v. Sisinni* may have shed some light on the amount of evidence that the taxing authority is required to provide. Of even more concern, however, is the fact that the court must have believed that it somehow did address this issue in its analysis, because its discussion of the Foster Foundation's claim that the disparate burdens of proof were unfair ends abruptly at this point in the decision.

b. The West Virginia Supreme Court Failed to Distinguish  
Between Which Party Bears the Burden of Proof and  
the Requisite Degree of Confidence That the Facts Are  
True

Neither the Foster Foundation nor Bayer objected to the fact that the taxpayer bears the burden of proof before the Board, given the United State Supreme Court's conclusions in *Concrete Pipe*. Nevertheless, having set up a straw man in its statement that "the Foundation's argument also challenges its corresponding burden of persuasion insofar as it complains that neither the Assessor nor the Commission was required to present evidence of a specific type to prove the correctness of their assessments,"<sup>342</sup> the West Virginia Supreme Court easily knocked it down, stating that "[r]equiring the party bringing a claim for relief to bear the burden of persuasion, however, is consistent with our jurisprudence."<sup>343</sup>

Some authorities assert that there are two components of the burden of persuasion: the facts that the party must introduce, and the degree of certainty that the factfinder must have that the facts are true. The degree of certainty is normally expressed as "by a preponderance of the evidence," "by clear and convincing evidence," and "beyond a reasonable doubt."<sup>344</sup> The latter component,

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during course of hearing, and burden of going forward with evidence, which may shift to opposing party.").

<sup>342</sup> *Foster*, 672 S.E.2d at 165.

<sup>343</sup> *In re Tax Assessment of Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 152 (W. Va. 2008) (citing *Boury v. Hamm*, 190 S.E.2d 13, 18 (W. Va. 1972)).

<sup>344</sup> 29 AM. JUR. 2D *Evidence* § 171, 173 (2010).

then, is synonymous with the term “standard of proof” as used in this article. In other cases, the West Virginia Supreme Court recognizes that the “burden of persuasion” and “standard of proof” have the same meaning.<sup>345</sup>

In *Foster*, then, when the court turned to the question of “whether it is constitutional to require an aggrieved taxpayer to prove his/her claim for relief from an erroneous tax assessment by clear and convincing evidence,”<sup>346</sup> it could have addressed whether the clear and convincing *standard* of proof was proper, but it did not. Rather, the *Foster* court first cited *Concrete Pipe* when it observed that the United States Supreme Court has approved placing the *burden* of proof on the party who is or should be in possession of the relevant facts,<sup>347</sup> and observed that the designation of a particular party as bearing the burden of proof does not generally raise constitutional issues.<sup>348</sup>

The West Virginia Supreme Court then cites three other cases that “have addressed the constitutionality of a taxpayer's burden of proof in tax assessment cases.”<sup>349</sup> While two of the three cases cited by the court do, in fact, address the issue of which party bears the *burden* of proof, they generally discuss constitutional aspects of that issue superficially, if at all.<sup>350</sup> The remaining case cited by the court deals almost entirely with the proper *standard of review*

<sup>345</sup> See *Mayhew v. Mayhew*, 519 S.E.2d 188, 210 (W. Va. 1999) (“Our task now is to review the circuit court's order by utilizing the active and passive appreciation framework heretofore outlined. Application of this new *burden of persuasion* to the instant proceeding is not prejudicial, because both parties had previously been given the *burden of persuasion* on each of the relevant elements of the test.”) (citing *Kornberg v. Kornberg*, 542 N.W.2d 379, 387 n.3 (Minn. 1996) (finding that a lower court's finding of an incorrect *standard of proof* must be reversed only if the error prejudices the other party)); see also *Brown v. Gobble*, 474 S.E.2d 489 (W. Va. 1996) (using terms interchangeably).

<sup>346</sup> *Foster*, 672 S.E.2d at 165.

<sup>347</sup> *Id.* (quoting *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 626 (1993) (“[i]n every case the *onus probandi* lies on the party who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant.”)).

<sup>348</sup> *Id.* (quoting *Lavine v. Milne*, 424 U.S. 577, 585 (1976) (“[o]utside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment.”) (footnote omitted)).

<sup>349</sup> *In re Tax Assessment of Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 166 (W. Va. 2008) (citing *Wilcox v. Comm'r of Internal Revenue*, 848 F.2d 1007 (9th Cir. 1988); *City of Troy v. Cleveland Pneumatic Tool Co.*, 311 N.W.2d 782 (Mich. App. 1981); *Lavine*, 424 U.S. at 585).

<sup>350</sup> Among other spurious claims, the taxpayer in *Wilcox v. Comm'r of Internal Revenue*, 848 F.2d 1007 (9th Cir. 1988), claimed that the imposition of the burden of proof upon him by the United States Tax Court violated due process, a claim that the Court of Appeals for the 9th Circuit dismissed in less than one sentence, holding that “placing the burden of proof on the taxpayer does not violate due process.” *Id.* at 1008 (citing *Rockwell v. Comm'r*, 512 F.2d 882, 885 (9th Cir.), *cert. denied*, 423 U.S. 1015 (1975)). Similarly, the only remotely relevant constitutional issue in *Troy v. Cleveland Pneumatic Tool Co.*, 311 N.W.2d 782 (Mich. App. 1981), was whether the parties had *sufficient notice* of who bears the burden of proof; the identity of the party that bears the burden was solely a matter of statutory construction.



before a circuit court,<sup>351</sup> not who bears the burden of proof or the proper standard of proof.<sup>352</sup> In citing the latter case, the court failed to properly distinguish between the standard of review and the standard of proof, although it did at least recognize that “the court did not specifically find the clear and convincing burden of proof to be constitutional.”<sup>353</sup>

The West Virginia Supreme Court seemed to realize at this point that it was on the wrong track, and concluded that “[f]rom these authorities, it is apparent that there is no constitutional infirmity to requiring a taxpayer to bear the burden of proof when challenging a tax assessment” and stated that “having gleaned little guidance as to the constitutionality of the clear and convincing burden of proof from these other jurisdictions, we must look to analogous decisions and bodies of law for further counsel.”<sup>354</sup>

As discussed above, the West Virginia Supreme Court then cited several of its prior cases wherein it had sanctioned the use of a clear and convincing standard of proof. Again, neither Bayer nor Foster Foundation claimed that a clear and convincing burden of proof is *never* appropriate, and the prior West Virginia cases, with a couple of exceptions, are largely consistent with cases decided by the Supreme Court of the United States.<sup>355</sup> The simple fact that the clear and convincing standard is appropriate in *some* cases, however, does not mean that it is *always* appropriate. Absent meaningful analysis as outlined by the Supreme Court of the United States in *Mathews*<sup>356</sup>, the cited cases have no bearing on whether that standard is appropriate to impose on a taxpayer in valuation appeals before a board of equalization and review.

The West Virginia Supreme Court in *Foster* then asserted that

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<sup>351</sup> In *LaGrange*, taxpayers sought administrative review in the Circuit Court of Cook County from a decision of the State Property Tax Appeal Board. *LaGrange State Bank No. 1713 v. DuPage Cnty. Bd. of Review*, 398 N.E.2d 992, (Ill. App. 2d Dist. 1979). The circuit court affirmed the Board’s decision and found it “to be supported by the evidence and in accordance with law.” *Id.* at 995. The taxpayers then appealed to Appellate Court of Illinois for the Second District. The circuit court in this case was clearly acting, as is also true for circuit courts here, as a court of review. In that situation, “the findings of an administrative agency, such as the [Board] on questions of fact are held to be *prima facie* true and correct. In order to reverse the administrative order, it is required that an opposite conclusion be clearly evident.” *Id.* at 997. Given that standard of review before the circuit court, the appellate court found that “[b]ased upon the evidence presented in the record before us, we conclude that the decision of the PTAB was not against the manifest weight of the evidence.” *Id.* at 998.

<sup>352</sup> The only mention of the standard of proof at the first adjudicative level in *LaGrange*, is a mention in passing that “[t]he PTAB is required to make a decision concerning the correct assessment of the subject property based upon the weight of the evidence received by it during the hearing.” *Id.* at 998. This seems closer to supporting a preponderance of the evidence standard than it does a clear and convincing standard.

<sup>353</sup> *In re Tax Assessment of Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 166 (W. Va. 2008).

<sup>354</sup> *Id.* at 166.

<sup>355</sup> See *supra* Part IV.B.2.

<sup>356</sup> *Mathews v. Eldridge*, 424 U.S. 319 (1976); see *infra* Part IV.D.

[p]erhaps most analogous to the taxpayer's burden of proof in the case *sub judice* is the burden of proof borne by a plaintiff in a case brought pursuant to the West Virginia Medical Professional Liability Act (hereinafter "the MPLA"). Under the MPLA, a court may require a plaintiff to provide evidence through expert testimony in support of his/her claim for relief.<sup>357</sup>

In a medical malpractice tort action, "a plaintiff's burden of proof is to show that a defendant's breach of a particular duty of care was a proximate cause of the plaintiff's injury."<sup>358</sup> Under the MPLA, expert testimony is not always required; rather,

[i]n medical malpractice cases where lack of care or want of skill is so gross as to be apparent, or the alleged breach relates to noncomplex matters of diagnosis and treatment within the understanding of lay jurors by resort to common knowledge and experience, failure to present expert testimony on the accepted standard of care and degree of skill under such circumstances is not fatal to a plaintiff's *prima facie* showing of negligence.<sup>359</sup>

Even if expert testimony is required by the trial court, however, that does not change the standard of proof that the plaintiff is required to meet; "[t]he burden of proving 'that the nonexistence of the presumed fact [i.e., due care] is more probable than its existence,' is the same as the burden of proving defendants' negligence 'by a preponderance of the evidence.'"<sup>360</sup> The fact that the plaintiff can be required to present expert testimony on an issue outside the everyday experiences of the jury, then, does not imply that a heightened standard of proof is applicable to the plaintiff, even in medical malpractice cases.

The West Virginia Supreme Court in *Foster* also stated that "plaintiffs in medical malpractice cases bear the burden of proving their claims,"<sup>361</sup> cited five cases<sup>362</sup> to support that proposition, and then observed that "[r]equiring

<sup>357</sup> *Id.* at 167 (citing W. VA. CODE § 55-7B-1, *et seq.*).

<sup>358</sup> *Mays v. Chang*, 579 S.E.2d 561, 565 (W. Va. 2003).

<sup>359</sup> *Farley v. Shook*, 629 S.E.2d 739, 744 (W. Va. 2006).

<sup>360</sup> *Matheny v. Fairmont Gen. Hosp., Inc.*, 575 S.E.2d 350, 358 (W. Va. 2002) (emphasis added).

<sup>361</sup> *In re Tax Assessment of Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 167 (W. Va. 2008).

<sup>362</sup> *Hundley v. Martinez*, 158 S.E.2d 159, 168 (W. Va. 1967); *Schroeder v. Adkins*, 141 S.E.2d 352, 357 (W. Va. 1965); Syl. pt. 2, *White v. Moore*, 62 S.E.2d 122, 125-26 (W. Va. 1950); Syl. pt. 2, *Dye v. Corbin*, 53 S.E. 147 (W. Va. 1906), *overruled on other grounds*, *Pleasants v. Alliance Corp.*, 543 S.E.2d 320 (W. Va. 2000); *Roberts v. Gale*, 139 S.E.2d 272, 275-76 (W. Va. 1964). The latter case also states the general rule before the MPLA was enacted that "in medical malpractice cases negligence or want of professional skill can be proved only by expert witnesses.

plaintiffs in medical malpractice cases to bear the burden of proof is derived from our more general negligence jurisprudence placing the burden of proof on plaintiffs to prove their claims of negligence,”<sup>363</sup> citing three additional cases.<sup>364</sup> Finally, the court again cited *Concrete Pipe* for the proposition that

[t]his placement of the burden of proof also is consistent with the United States Supreme Court’s recognition that “[i]n every case the *onus probandi* lies on the party who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant.”<sup>365</sup>

After observing that the Foster Foundation “did not have notice of its burden of proof or of the specific type of evidence required to satisfy this burden”<sup>366</sup> and after again misstating the Foster Foundation’s claim (“the Foundation argues simply that the clear and convincing burden of proof is unfair”),<sup>367</sup> the court then concluded that “[i]t is not unreasonable or unfair, however, to require the party claiming to have superior knowledge of the value of its own property to shoulder the burden of presenting such evidence to the decision maker.”<sup>368</sup> Up to this point, the court is preaching to the choir, as nobody claimed that the taxpayer should not bear the burden of proof.

Then, the West Virginia Supreme Court asserted that “[n]either is it a denial of due process to impose more stringent standards upon a complaining taxpayer in an attempt to prevent frivolous tax assessment challenges.”<sup>369</sup> This citation is especially perplexing, because there, the court specifically declined to address the constitutionality of a statute which sets a “more stringent” requirement of proof by requiring a plaintiff in a medical malpractice suit to file a pre-suit notice of claim and screening certificate of merit.<sup>370</sup> Since the court declined to address the constitutional issue of whether the more stringent standard was proper, *Hinchman* hardly supports the proposition for which it was cited in *Foster Foundation*.

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This rule has been qualified to permit negligence to be established by lay witnesses in cases where negligence or want of professional skill is so obvious as to dispense with the need for expert testimony.” *Roberts*, 139 S.E.2d at 276 (citations omitted).

<sup>363</sup> *Foster*, 672 S.E.2d at 168.

<sup>364</sup> Syl. pt. 3, *Keister v. Talbott*, 391 S.E.2d 895 (W. Va. 1990); Syl. pt. 2, *Walton v. Given*, 215 S.E.2d 647 (W. Va. 1975); Syl. pt. 2, *Smith v. Edward M. Rude Carrier Corp.*, 151 S.E.2d 738 (W. Va. 1966).

<sup>365</sup> *Foster*, 672 S.E.2d at 168.

<sup>366</sup> *Id.* at 168–69.

<sup>367</sup> *Id.* at 169.

<sup>368</sup> *Id.* (citing *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 626 (1993)).

<sup>369</sup> *Id.* (citing *Hinchman v. Gillette*, 618 S.E.2d 387, 389 (W. Va. 2005))

<sup>370</sup> *Id.* at 393.

Ironically, Justice Davis wrote a concurring opinion in *Hinchman*, in which she opined that the pre-suit notice of claim and screening certificate of merit requirement in the West Virginia Medical Professional Liability Act (MPLA) violates the Certain Remedy Clause of the West Virginia Constitution,<sup>371</sup> a view apparently shared by the Supreme Court of Oklahoma.<sup>372</sup> Apparently, her opinion as to whether a “more stringent” standard should be applicable is different in tax cases than it is in medical malpractice cases. In any event, her view in *Hinchman* was clearly not shared by the other members of the court.<sup>373</sup> Moreover, even had the court upheld the constitutionality of that provision in the MPLA in *Hinchman*, it is difficult to see how the question of whether the MPLA violates the Certain Remedy Clause of the West Virginia Constitution has any bearing on whether a heightened standard of proof violates the Due Process Clause.

Then, having cited primarily cases which can only stand for the proposition that it is not a denial of due process to require the taxpayer to bear the *burden* of proof, the court in *Foster Foundation* concluded that

Accordingly, we hold that requiring a taxpayer challenging a property tax assessment in accordance with W. Va.Code § 11-3-24 (1979) (Repl.Vol.2008) to prove by clear and convincing evidence that the assessor's assessment is erroneous does not violate the constitutional due process protections provided by section one of the Fourteenth Amendment to the United States Constitution or by section ten of Article III of the West Virginia Constitution.<sup>374</sup>

This conclusion is entirely unwarranted by the authorities cited. It is especially inexcusable, given the court's repeated citations of *Concrete Pipe*, in which the Supreme Court of the United States clearly established that, while requiring a particular party to bear the burden of proof is constitutionally unremarkable, the required standard of proof can implicate constitutional concerns.

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<sup>371</sup> See also *Blankenship v. Ethicon, Inc.*, 656 S.E.2d 451, 454 n.2 (W. Va. 2007) (where Justice Davis articulates her belief that the MPLA's pre-suit notice and a certificate of merit requirements are unconstitutional).

<sup>372</sup> See *Zeier v. Zimmer, Inc.*, 152 P.3d 861 (Okla. 2006).

<sup>373</sup> *Hinchman*, 618 S.E.2d at 394 (“The requirement of a pre-suit notice of claim and screening certificate of merit is not intended to restrict or deny citizens' access to the courts.”); see also *Id.* at 408 (“... I wish to make clear my firm conviction that W.Va.Code § 55-7B-6 is constitutional.”) (Maynard, J., concurring in part and dissenting in part).

<sup>374</sup> *In re Tax Assessment of Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 169 (W. Va. 2008).

*D. What Should the Court Have Done in Foster?*

The Supreme Court of the United States has considered which of the three standards of proof is required to meet due process requirements in a variety of cases. In *Mathews v. Eldridge*,<sup>375</sup> the Court established a framework for its analysis of the applicable standard of proof, holding that “resolution of the issue whether the administrative procedures provided ... are constitutionally sufficient requires analysis of the governmental and private interests that are affected” and requires consideration of three distinct factors:

1. the private interest that will be affected by the official action;
2. the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
3. the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Balancing these three factors is required to determine the appropriate standard.<sup>376</sup>

The West Virginia Supreme Court of Appeals has adopted this framework. For example, in *State ex rel. Jeanette H. v. Pancake*,<sup>377</sup> it cited *Mathews* when it defined the specific procedures necessary to insure due process requirements are met:

We have previously explained that in determining the specific procedures necessary to protect a liberty interest, we should consider three general factors:

The specific procedural protections accorded to a due process liberty or property interest generally require[ ] consideration of three distinct factors: first, the private interest that will be affected by state action; second, the risk of an erroneous deprivation of the protected interest through the procedures used, and the probable value, if any[,] of additional or substitute procedural safeguards; and third, the government's interest, including the function involved and the fiscal and administrative burdens

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<sup>375</sup> 424 U.S. 319 (1976).

<sup>376</sup> *Id.* at 334.

<sup>377</sup> 529 S.E.2d 865 (W. Va. 2000).

that the additional or substitute procedural requirements would entail.<sup>378</sup>

The court also observed that

We have also recognized that there are certain fundamental principles to be applied when conducting a due process analysis, and due process requirements may need to be tailored to the specific circumstances of the case under consideration:

Applicable standards for procedural due process, outside the criminal area, may depend upon the particular circumstances of a given case. However, there are certain fundamental principles in regard to procedural due process embodied in Article III, Section 10 of the West Virginia Constitution, which are; First, the more valuable the right sought to be deprived, the more safeguards will be interposed. Second, due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise. Third, a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation.<sup>379</sup>

The West Virginia Supreme Court of Appeals has also recognized that United States Supreme Court applies the *Eldridge* standards in the context of due process analysis for the applicable standard of proof.<sup>380</sup>

It is clear, then, that once the court in *Foster Foundation* decided to address the issue of whether the clear and convincing standard of proof violates due process guarantees, it should have performed an analysis of the factors enumerated in *Eldridge*, just as the United States Supreme Court has consistently “engaged in a straight-forward consideration of the factors identified in *Eldridge* to determine whether a particular standard of proof in a particular proceeding satisfies due process.”<sup>381</sup> Had the court undertaken this analysis, it is unlikely that the imposition of the clear and convincing standard of proof would have been upheld.

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<sup>378</sup> *Id.* at 874.

<sup>379</sup> *Id.* See also *State ex rel. Hoover v. Smith*, 482 S.E.2d 124, 128 n.5 (W. Va. 1997) (articulating the same standards “outside the criminal area”).

<sup>380</sup> See *Markey v. Wachtel*, 264 S.E.2d 437, 442 (W. Va. 1979) (“[W]e adopted under Article III, Section 10, the standard set out in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), that once a liberty or property interest is implicated, the right to some procedural due process protection arises.... the [United States Supreme] Court determined that the standard of proof necessary to sustain an involuntary commitment must be by clear and convincing evidence but need not be proof beyond a reasonable doubt.”) (citing *Addington v. Texas*, 441 U.S. 418 (1979)).

<sup>381</sup> *Santosky v. Kramer*, 455 U.S. 745, 754 (1982).

1. The Private Interest That Will Be Affected By the Official Action

The United States Supreme Court has held that due process places a heightened burden of proof on the State in civil proceedings in which the “individual interests at stake . . . are both ‘particularly important’ and ‘more substantial than mere loss of money.’”<sup>382</sup> Thus, if the state had initiated a proceeding to collect unpaid taxes against a taxpayer, it is doubtful that the state would be required to meet the clear and convincing standard of proof, since the taxpayer’s interest is neither ‘particularly important’ nor ‘more substantial than mere loss of money.’

2. The Government’s Interest, Including the Function Involved and the Fiscal and Administrative Burdens That the Additional or Substitute Procedural Requirement Would Entail

The Tax Commissioner’s response brief in the *Bayer MaterialScience* case, after recognizing that *Eldridge* requires a balancing test when determining whether due process requirements have been met,<sup>383</sup> defined the government’s interest as follows:

[T]he state - in this case Kanawha County - has a critical interest in the *ad valorem* property tax process. Taxes are the life’s blood of government. If the government cannot determine and collect adequate tax revenues, then the government cannot perform the very functions of government and cannot provide the essential services demanded by the public. In the instant case, if Kanawha County cannot collect adequate tax revenues from all sources, then law enforcement efforts may be reduced, public schools may be impaired, and the public welfare may suffer.<sup>384</sup>

In fact, that interest is important enough to justify reversing the normal process for depriving one of his or her property, as explained by the United States Supreme Court in *Bull v United States*,<sup>385</sup>

A tax is an exaction by the sovereign, and necessarily the sovereign has an enforceable claim against every one within the taxable class for the amount lawfully due from him. The statute prescribes the rule of taxation. Some machinery must be pro-

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<sup>382</sup> *Id.* at 756.

<sup>383</sup> See *Tax Department’s Brief Opposing Appeal*, Nos. 33378, 33880, and 33881, at 10.

<sup>384</sup> *Id.*

<sup>385</sup> 295 U.S. 247 (1935).

vided for applying the rule to the facts in each taxpayer's case, in order to ascertain the amount due. The chosen instrumentality for the purpose is an administrative agency whose action is called an assessment . . . . Once the tax is assessed, the taxpayer will owe the sovereign the amount when the date fixed by law for payment arrives. Default in meeting the obligation calls for some procedure whereby payment can be enforced. The statute might remit the government to an action at law wherein the taxpayer could offer such defense as he had. A judgment against him might be collected by the levy of an execution. But taxes are the lifeblood of government, and their prompt and certain availability an imperious need. Time out of mind, therefore, the sovereign has resorted to more drastic means of collection. The assessment is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt.

In recognition of the fact that erroneous determinations and assessments will inevitably occur, the statutes, in a spirit of fairness, invariably afford the taxpayer an opportunity at some stage to have mistakes rectified. Often an administrative hearing is afforded before the assessment becomes final; or administrative machinery is provided whereby an erroneous collection may be refunded; in some instances both administrative relief and redress by an action against the sovereign in one of its courts are permitted methods of restitution of excessive or illegal exaction. Thus, the usual procedure for the recovery of debts is reversed in the field of taxation. Payment precedes defense, and the burden of proof normally on the claimant, is shifted to the taxpayer. The assessment supersedes the pleading, proof, and judgment necessary in an action at law, and has the force of such a judgment. The ordinary defendant stands in judgment only after a hearing. The taxpayer often is afforded his hearing after judgment and after payment, and his only redress for unjust administrative action is the right to claim restitution. But these reversals of the normal process of collecting a claim cannot obscure the fact that after all what is being accomplished is the recovery of a just debt owed the sovereign. If that which the sovereign retains was unjustly taken in violation of its own statute, the withholding is wrongful. Restitution is owed the taxpayer<sup>386</sup>

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<sup>386</sup> *Id.* at 259–60.



Thus, the interest of the government, although admittedly important, is already protected since (1) the government serves as the tribunal in the pre-deprivation first level adjudicative hearing; (2) the burden of initiating the action and the burden of proof are shifted to the taxpayer; and (3) most likely, the appeals to a circuit court and Supreme Court are post-deprivation appeals, because the government's decision at the first level hearing governs the amount of taxes due, and the due date will probably occur before the court appeals are heard.

Finally, the substitute procedural requirement here (requiring the taxpayer to meet the preponderance of the evidence standard in place of the clear and convincing standard) would entail no additional fiscal or administrative burdens on the taxing authority beyond that enunciated by the court in *Pocahontas Land*.

### 3. The Risk of an Erroneous Deprivation through the Procedures Used, and the Probable Value, if Any, of Additional or Substitute Procedural Safeguards

The hearing transcripts in the *Bayer MaterialScience* cases showed that the Commission relied on the "clear and convincing" standard not as an indication of "to what degree of probability the [taxpayer] must persuade the [Board] that the [Tax Commissioner] was wrong,"<sup>387</sup> but as a nearly insurmountable hurdle that allows the Commission to disregard the taxpayer's evidence even where the Tax Commissioner acknowledged errors and unreliable methodology in valuation. Thus, the transcript reflected that the heightened standard of proof employed by the Commission virtually guaranteed that it will rule in favor of the taxing authority regardless of the lack of competent evidence supporting the Tax Commissioner's initial valuations, and that in doing so, the taxpayer was denied its right to constitutionally meaningful review. The risk of an erroneous deprivation through the existing procedures is therefore high. The probable value of reducing the standard of proof, of course, is unknowable, but at the very least, the simple fact that the standard is lowered should indicate to the tribunals that a more fair hearing is required.

Given the fact that the government's admittedly important interests are at least adequately protected by the overall process for appeals of *ad valorem* tax assessments, and given the very minimal at most additional fiscal or administrative burdens on the taxing authority, fairly balancing all of these factors would almost certainly lead to the conclusion that there is no justification for the court's requirement that the taxpayer meet the clear and convincing standard of proof.

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<sup>387</sup> *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 601, 621 (1993).

#### 4. The Significance of Rules from Other States

The Supreme Court of the United States has also characterized the relevant inquiry required to determine whether a particular standard passes muster is whether it “‘offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental’”;<sup>388</sup> if so, “‘the State’s power to regulate procedural burdens [is] subject to proscription under the Due Process Clause.’”<sup>389</sup> A near-uniform application of a given standard of proof in a certain type of case can serve as a strong indication that its application is fundamentally fair; conversely, departure from that near-uniform practice may be considered to violate due process.

Thus, in *Cooper*, the fact that most other states mandated a standard that was more protective of the defendant's rights than Oklahoma's clear and convincing evidence rule was held to support the Court's conclusion that the heightened standard offends a principle of justice that is deeply “‘rooted in the traditions and conscience of our people. . . .”<sup>390</sup> By the same token, in *Rivera v. Minnich*,<sup>391</sup> the Court stated that “[a] legislative judgment that is not only consistent with the ‘dominant opinion’ throughout the country but is also in accord with ‘the traditions of our people and our law’ is entitled to a powerful presumption of validity when it is challenged under the Due Process Clause of the Fourteenth Amendment.”<sup>392</sup> In that case, the fact that most states imposed a simple preponderance of the evidence standard in paternity cases supported the Court's conclusion that the preponderance standard met the requirements of due process. As the Court pointed out in *Rivera*, in *Addington v. Texas*, the Court's rejection of the state's argument that a preponderance standard of proof was sufficient in a civil proceeding to commit an individual to a state mental hospital involuntarily was supported by the fact that a majority of the states had chosen to apply either a clear and convincing standard or the even more demanding criminal law standard. And in *Santosky v. Kramer*, which presented the question whether New York could extinguish a pre-existing parent-child relationship without requiring greater factual certainty than a fair preponderance of the evidence, the Court began its analysis by noting that thirty-eight jurisdictions required a higher standard of proof in proceedings to terminate parental rights.<sup>393</sup>

At the point in the decision in *Foster Foundation* where the court decided, after a cursory review of its own prior case law, to expressly overrule *Killen*, and *Eastern American Energy Corp.*, and held that the clear and con-

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<sup>388</sup> *Cooper v. Oklahoma*, 517 U.S. 348, 355 (1996) (citing *Medina v. California*, 505 U.S. 437 (1992)).

<sup>389</sup> *Id.* at 367.

<sup>390</sup> *Id.* at 362 (quoting *Medina*, 505 U.S. at 445).

<sup>391</sup> 483 U.S. 574 (1987).

<sup>392</sup> *Id.* at 578.

<sup>393</sup> *Id.* at 579.

vincing standard applied in a hearing before a board of equalization and review, the court inserted a lengthy footnote citing cases purporting to show that the majority of jurisdictions in the United States use a clear and convincing standard in taxpayer appeals.<sup>394</sup> A review of the cases cited, however, reveals that the cases cited are almost equally split between those which require the intermediate standard and those that require only the lesser standard. Justice Benjamin, in his dissent, also cited a list of cases and statutes from other jurisdictions that he used as a basis to conclude that other jurisdictions were inconsistent in which standard was applicable, and that legislatures were more likely than courts to choose the lesser standard. Unfortunately, both lists are incomplete, and both include irrelevant cases which have nothing to do with property tax appeals.

The majority cited seven states that purportedly use a clear and convincing standard. However, the legislatures in two of those seven states (Illinois and Oregon) have since lowered the standard for valuation appeals to the lower preponderance of the evidence standard since the cases cited by the majority were decided.<sup>395</sup> In his dissent, Justice Benjamin correctly identified Oregon as one of the states using the lower standard.<sup>396</sup> Washington has also legislatively changed its standard since the case cited by the majority was decided. The new standard in that state is a mixed bag:

An assessor's valuation of property for tax purposes is presumed correct. This presumption may be overcome, however, if the taxpayer presents clear, cogent, and convincing evidence that the property was overvalued. Once the taxpayer overcomes the presumption that an assessor's overall valuation technique is correct, the standard of proof shifts to a preponderance of the evidence for all issues.<sup>397</sup>

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<sup>394</sup> *In re Tax Assessment of Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 163 n.20 (W. Va. 2008).

<sup>395</sup> See *Winnebago Cnty. Bd. Of Review v. Prop. Tax Appeal Bd.*, 728 N.E.2d 1256, 1259–60 (Ill. App. Ct. 2000); *Precision Powder Coating, Inc. v. Clackamas Cnty. Assessor*, No. TC-MD 070690D, 2008 WL 1159327, at \*1 (Or. T.C. 2008).

<sup>396</sup> In his dissent, Justice Benjamin also identified Illinois as a state that uses the clear and convincing standard in valuation disputes, citing *Leadertreks, Inc. v. Dept. of Revenue*, 895 N.E.2d 683 (Ill. App. Ct. 2008). That case, however, was a dispute over whether a taxpayer qualified for an exemption, which in Illinois does require the higher standard of proof. A similar rule exists in West Virginia. The general rule is that taxing statutes will be strictly construed against the State and in favor of the taxpayer; however, an exception to this general rule applies where the taxpayer is claiming an exemption from taxation. See *Ballard's Farm Sausage, Inc. v. Dailey*, 246 S.E.2d 265 (W. Va. 1978). Although later in his opinion, Justice Benjamin recognized that a State may apply a "lesser burden for one issue, such as assessments, and a more stringent burden for another issue," he failed to recognize that *Leadertreks* applies only to the issue of whether an exemption applies, but not to the issue of value.

<sup>397</sup> See *Washington Beef, Inc. v. Cnty. of Yakima*, 177 P.3d 162, 174–75 (Wash. Ct. App. 2008).

Justice Benjamin also specified Washington as a state that uses the clear and convincing standard, but that is clearly an oversimplification. For example, in *Washington Beef, Inc. v. County of Yakima*<sup>398</sup> because the taxpayer proved by clear and convincing evidence that the cost approach used by the County Assessor did not recognize economic obsolescence, he had only to meet a preponderance of the evidence standard to prove the amount of economic obsolescence present. It was simply inaccurate, then, for the majority to list Illinois, Oregon, and Washington as states applying the higher standard in valuation cases.

The majority also includes New Jersey as a state using the higher standard, but the cited case doesn't deal with property taxes or even with taxes at all. Rather, that case deals with special assessments levied by a municipality to reimburse it for the costs of paving streets and installing curbs. Like New Jersey, many states make a distinction between fees and taxes; the distinction is based on the following definition: "[t]he primary purpose of a tax is to obtain revenue for the government, while the primary purpose of a fee is to cover the expense of providing a service or of regulation and supervision of certain activities."<sup>399</sup> The level of scrutiny that a court will bring to bear often depends into which category the challenged assessment falls.<sup>400</sup> Since the challenged assessment in New Jersey was treated as a fee, the standard of proof there has no bearing on the issue before West Virginia's Court. And in fact, the proper standard in New Jersey is much closer to the preponderance of the evidence standard.<sup>401</sup>

Thus, only three (Nebraska, Nevada, and Tennessee) of the seven states identified by the majority as requiring a taxpayer to meet the clear and convincing standard actually do so. In another three, the Legislature has changed the standard since the cases cited by the majority were decided, and in one state, the case cited had nothing to do with property tax valuation appeals. Justice Benjamin identified Alabama, Arkansas, Connecticut, and Maine as states that use the clear and convincing standard. In fact, none of the cases he cited were di-

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<sup>398</sup> *Id.*

<sup>399</sup> *River Falls v. St. Bridget's Catholic Church*, 513 N.W.2d 673, 675 (Wis. Ct. App. 1994).

<sup>400</sup> For example, West Virginia restricts a municipality's ability to impose either to situations specifically authorized by the legislature. Generally speaking, the courts are less likely to overturn fees, while taxes are subject to closer scrutiny. See *City of Huntington v. Bacon*, 473 S.E.2d 743 (W. Va. 1996). In West Virginia, ordinances enacted pursuant to a municipality's powers granted by the legislature are presumptively valid and a court should not invalidate such an ordinance unless it is clearly unreasonable. The burden of proof lies with the appellant to prove that the user fee is clearly unreasonable and that it clearly fails to reasonably serve the purpose for which it was enacted. *Cooper v. City of Charleston*, 624 S.E.2d 716 (W. Va. 2005). The opposite rule applies to taxes. See *Ballard's*, 246 S.E.2d at 265.

<sup>401</sup> See *Cohn v. Livingston Twp.*, 18 N.J. Tax 429 (N.J. Tax Ct. 1999) ("There is a presumption of correctness in favor of the [county board of taxation's] aforementioned 1996 judgment, which can be 'overcome by sufficient competent evidence of true value of the property.' Similarly, there is a presumption of validity that attaches to the 1997, 1998, and 1999 assessments [a city's assessments] which also may be overcome 'by offering evidence of the true value of the property 'based on sound theory and objective data, rather than on mere wishful thinking.'" *City of Atlantic City v. Ace Gaming, LLC*, 23 N.J. Tax 70, 98 (2006) (citations omitted)).

rectly on point; all of those states come much closer to using the preponderance of the evidence standard.<sup>402</sup>

The majority opinion concluded that five states use the lower preponderance of the evidence standard (Colorado, Florida, Maine, Missouri, and Virginia),<sup>403</sup> and one (New York) uses a “substantial evidence” standard that may be even less demanding than the preponderance of the evidence standard.<sup>404</sup> The court’s research wasn’t better here either; Florida uses a mixed standard similar to Washington’s,<sup>405</sup> as does Virginia.<sup>406</sup> More complete research reveals that only four states (including West Virginia)<sup>407</sup> mandate that a taxpayer meet the clear and convincing standard at the first adjudicatory level, and one mandates a standard that seems to be even less stringent than a preponderance of the evidence.<sup>408</sup> Three other states use a mixed standard; that is, a heightened standard in some circumstances and a relaxed standard in others.<sup>409</sup> On the other hand, twenty-one states have adopted the preponderance of the evidence standard,<sup>410</sup>

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<sup>402</sup> See ALA. CODE 1975 § 40-3-19; A.R.C.A. § 26-27-317; *Sears Roebuck & Co. v. Board of Tax Review of W. Hartford*, 699 A.2d 81 (Conn. 1997); *Frank v. Assessors of Skowhegan*, 329 A.2d 167, 172 (Me. 1974).

<sup>403</sup> *In re Tax Assessment of Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 163 n.20 (W. Va. 2008).

<sup>404</sup> *Id.*

<sup>405</sup> See FLA. STAT. § 194.301 (2009).

<sup>406</sup> See *Keswick Club, L.P. v. Cnty. of Albemarle*, 639 S.E.2d 243, 250 (Va. 2007) (“[W]here the taxing authority failed to consider and properly reject the other approaches, [it] is not entitled to a presumption of validity. Therefore, the taxpayer was required only to show that the county’s assessment was erroneous, not that the county committed manifest error or disregarded controlling evidence in making its assessment.”) (citations omitted).

<sup>407</sup> Nebraska (see *Brenner v. Banner Cnty. Bd. of Equalization*, 753 N.W.2d 802, 813 (Neb. 2008)); Nevada (see *Nevada ex rel. State Bd. of Equalization v. Bakst*, 148 P.3d 717, 721 (Nev. 2006). Ironically though, the legal issue in *Bakst* was the same as one raised by Bayer: whether a valid methodology was used to appraise the taxpayer’s property. Unlike Bayer’s case, however, the court addressed that issue in Nevada—in fact, it ruled that the assessment was invalid because the method used had been invented by the county and had not been promulgated by the Tax Department. Even though that method may have conformed to generally accepted appraisal practices (as clearly was not true in *Bayer MaterialScience*), it could not have been applied uniformly throughout the state since only one county used it. Tennessee (see *Hilloak Realty Co. v. Chumley*, 233 S.W.3d 816 (Tenn. Ct. App. 2007); and now, West Virginia.

<sup>408</sup> North Carolina (see *In re Owens*, 547 S.E.2d 827, 829 (N.C. Ct. App. 2001) (“the taxpayer carries the burden to show that an illegal or arbitrary method of valuation was used, and that the assessed value substantially exceeds the property’s fair market value”).

<sup>409</sup> Virginia (see *Keswick Club, L.P.*, 639 S.E.2d 243); Washington (see *Washington Beef, Inc. v. Yakima*, 177 P.3d 162 (Wash. Ct. App. 2008)); and Florida (see FLA. STAT. § 194.301 (2009)).

<sup>410</sup> California (see *California Minerals v. Kern*, 62 Cal. Rptr. 3d 1 (Cal. Ct. App. 2007)) (“[Before the AAB, the taxpayer must prevail by] the production of a preponderance of competent evidence of another value”);

Colorado (see COLO. REV. STAT. § 39-8-107) (new statute passed pursuant to article X, section 20 of the Colorado Constitution, called the Taxpayer’s Bill of Rights, or “TABOR,” which eliminates the presumption in favor of any pending valuation); see also *Bd. of Assessment Appeals v. Samp-*

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son, 105 P.3d 198, 204 (Colo. 2005) ("A taxpayer who protests a residential property tax assessment in a Board of Assessment Appeals (BAA) proceeding has the burden to prove by a preponderance of the evidence that the property assessment is incorrect");

Georgia (*see* OCGA § 48-5-311(e)4) ("The determination by the county board of tax assessors of questions of factual characteristics of the property under appeal, as opposed to questions of value, shall be prima-facie correct in any appeal to the county board of equalization. However, the board of tax assessors shall have the burden of proving their opinions of value and the validity of their proposed assessment by a preponderance of evidence."); § 48-5-311 (g)(3) ("The appeal [to superior court] shall constitute a de novo action. The board of tax assessors shall have the burden of proving their opinions of value and the validity of their proposed assessment by a preponderance of evidence. Upon a failure of the board of tax assessors to meet such burden of proof, the court may, upon motion or *sua sponte*, authorize the finding that the value asserted by the taxpayer is unreasonable and authorize the determination of the final value of the property"). Note: not only does Georgia use the lower standard of proof by statute, but the burden of proof is on the state, not the taxpayer).

Idaho (*see* IDAHO CODE § 63-511(4)) ("In any appeal taken to the board of tax appeals or the district court pursuant to this section, the burden of proof shall fall upon the party seeking affirmative relief to establish that the valuation from which the appeal is taken is erroneous, or that the board of equalization erred in its decision regarding a claim that certain property is exempt from taxation, the value thereof, or any other relief sought before the board of equalization. A preponderance of the evidence shall suffice to sustain the burden of proof.");

Illinois (*see* *Peacock v. Illinois Prop. Tax Appeal Bd.*, 792 N.E.2d 367, 376 (Ill. App. Ct. 2003) ("a plaintiff's claim of excessive assessment must be proved by a preponderance of the evidence."));

Iowa (*see* *Post Week Cable, Inc. v. Bd. of Review of Woodbury Cnty.*, 497 N.W.2d 810, 813 (Iowa 1993); IOWA CODE § 441.21 ("[T]he complainant must prove by a preponderance of the evidence that the challenged valuation is excessive, inadequate, or capricious."));

Kansas (*see* *Saline Cnty. Bd. of Cnty. Comm'r v. Jensen*, 88 P.3d 242 (Kan. Ct. App. 2004); K.S.A. 79-2005(i) ("[I]t shall be the duty of the county appraiser to initiate the production of evidence to demonstrate, by a preponderance of the evidence, the validity and correctness of such determination."));

Kentucky (*see* *Ky. Rev. Stat. § 13B.090* (1996)). The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record. Note: The KBTA is an "administrative review agency" endowed with exclusive jurisdiction over certain appeals from rulings and orders affecting revenue and taxation.

Maryland (*see* *A.S. Abell Co. v. State Dept. of Assessments and Taxation*, 1965 WL 118 (Md. Tax, 1965) ("With respect to the weight of evidence, it is true, of course, that a mere surmise or conjecture that it was sufficient would not be enough. The comparative degree of proof by which a case must be established is the same in an administrative as in a civil judicial proceeding, *i.e.* a preponderance of the evidence is necessary.") (quoting *Bernstein v. Real Estate Comm'n*, 221 Md. 221, 230 (1959) (citations omitted)));

Michigan (*see* *Prof'l Plaza, LLC v. Detroit*, 647 N.W.2d 529 (Mich. Ct. App. 2002); *Matthews v. Grand Ledge*, MTT No. 190382, 1996 WL 172549 (1996) (while conclusive presumption of validity of assessment cannot be made, burden of proof in property tax valuation proceeding is on taxpayer to establish, with preponderance of evidence, true cash value of property (before Tax Tribunal)));

Minnesota (*see* *U Haul Real Estate Co. v. Cnty. Of Dakota*, 2008 WL 650290 (Minn. Tax. Ct. 2008) (taxpayer has burden to overcome by the introduction of credible evidence as to the subject property's market value));

Mississippi (*see* Miss. State Tax Comm'n v. ANR Pipeline Co., 806 So. 2d 1081 (Miss. 2001); *McArdle's Estate v. Jackson*, 61 So. 2d 400 (Miss. 1952); MISS. CODE § 27-77-7(4) (2006)) (taxpayer had burden of proving excessiveness of tax assessment by preponderance of evidence (same as in all civil cases));

Missouri (*see* MO. REV. STAT. § 138.060 (eliminating presumption that Assessor's value is correct); *Indus. Dev. Auth. of Kan. City v. State Tax Comm'n of Mo.*, 804 S.W.2d 387, 392 (Mo. Ct. App. 1991) ("The taxpayer in a Commission tax appeal still bears the burden of proof and must show by a preponderance of the evidence that the property was improperly classified or valued."));

New Hampshire (*see* *Porter v. Sanbornton*, 840 A.2d 778, 783 (N.H. 2003) ("To succeed on their tax abatement claim, the plaintiffs have the burden of proving by a preponderance of the evidence that they are paying more than their proportional share of taxes."));

New York (*see* *NYCO Minerals, Inc. v. Lewis*, 745 N.Y.S.2d 268, 268 (N.Y. App. Div. 2002) ("In a proceeding to reduce tax assessment, a real property owner who hurdles the low substantial evidence threshold, where weight and credibility of evidence are not considered, extinguishes the assessor's presumption of validity, but still maintains the burden of proving by a preponderance of the evidence that the assessment is excessive."));

North Dakota (*see* *Mills v. Bd. of Cnty. Comm'n of Burleigh Cnty.*, 305 N.W.2d 832, 833-34 (N.D. 1981) ("Pursuant to the pertinent provisions of Section 28-32-19, N.D.C.C., we must affirm the decision of the administrative agency unless we find: . . . "5. The findings of fact made by the agency are not supported by the preponderance of the evidence."));

Oregon (*see* OR. REV. STAT. §305.427 (2005); *Precision Powder Coating, Inc. v. Clackamas Cnty. Assessor*, 2008 WL 1159327 (Or. Tax Magistrate Div., 2008) ("In all proceedings before the judge or a magistrate of the tax court and upon appeal therefrom, a preponderance of the evidence shall suffice to sustain the burden of proof. The burden of proof shall fall upon the party seeking affirmative relief and the burden of going forward with the evidence shall shift as in other civil litigation. Taxpayers must provide competent evidence of the RMV of their property.") (citations omitted));

Rhode Island (*see* R.I. Gen. Laws §8-8-28 (1984) ("In all tax cases before the court, and upon appeal therefrom, a preponderance of the evidence shall suffice to sustain the burden of proof. The burden of proof shall fall upon the party seeking affirmative relief and the burden of going forward with the evidence shall shift as in other civil litigation. In any proceedings in which the division of taxation alleges fraud or an exception to the normal statute of limitations on assessment, the burden of proof in respect of that issue shall be upon the division of taxation. To be sustained on the issue of fraud, the division of taxation must sustain a burden of clear and convincing proof."));

Texas (*see* TEX. TAX CODE § 41.43(a) ("[T]he appraisal district has the burden of establishing the value of the property by a preponderance of the evidence presented at the hearing. If the appraisal district fails to meet that standard, the protest shall be determined in favor of the property owner. . . . If in the protest relating to a property with a market or appraised value of \$1 million or less and the property owner delivers to the chief appraiser a copy of an appraisal of the property that supports the appraised or market value of the property asserted by the property owner, the appraisal district has the burden of establishing the value of the property by clear and convincing evidence presented at the hearing."));

Utah (*see* UTAH CODE § 59-1-604 (1992) ("In [*de novo*] proceedings of the district court under this part and on appeal therefrom, a preponderance of the evidence shall suffice to sustain the burden of proof."); *see also* *Utah Power & Light Co. v. Tax Comm'n*, 590 P.2d 332, 335 (Utah 1979) ("[W]here the taxpayer claims error, it has an obligation not only to show substantial error or impropriety in the assessment, but also to *provide a sound evidentiary basis* upon which the Commission could adopt a lower valuation."));

Wyoming (*see* *BP Am. Prod. Co. v. Wyo. Dep't of Revenue*, 112 P.3d 596, 598 (Wyo. 2005) ("The petitioner, however, by challenging the valuation, bears the ultimate burden of persuasion to

and fifteen others use a similarly relaxed standard.<sup>411</sup> The fact that most states imposed a simple preponderance of the evidence standard for tax appeals, then,

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prove by a preponderance of the evidence that the valuation was not derived in accordance with the required constitutional and statutory requirements for valuing state-assessed property”).

<sup>411</sup> Alabama (*see* ALA. CODE § 40-3-25) (taxpayer must present competent evidence);

Alaska (*see* ALASKA STAT. § 29.45.210(b)) (proof of unequal, excessive, improper, or under valuation based on the facts that are stated in a valid, written appeal or proven at the appeal hearing; the burden then shifts to the taxing authority to introduce credible evidence which substantiates its assessment);

Arizona (*see* Suncor Dev. Co. v. Maricopa Cnty., 788 P.2d 136 (Ariz. 1990)) (“evidence satisfactory to the court”; evidence expressing an opinion of value must, at the least, be by testimony presented by an expert qualified by the Court. Furthermore, the taxpayer must introduce documentary evidence in support of any opinion on valuation offered);

Arkansas (*see* ARK. CODE § 26-27-317; Doniphan Lumber Co. v. Cleburne Cnty., 212 S.W. 308 (Ark. 1919) (“[T]he burden is on the petitioner to show by proof that the valuations placed upon the several tracts were unfair and inequitable when compared with the valuations placed upon other lands of the same kind and character similarly situated.”));

Connecticut (*see* Sears Roebuck & Co. v. Bd. of Tax Review of W. Hartford, 699 A.2d 81, 85 (Conn. 1997) (“Mere overvaluation is sufficient to justify redress under [§ 12-117a], and the court is not limited to a review of whether an assessment has been unreasonable or discriminatory or has resulted in substantial overvaluation.”));

Maine (*see* Frank v. Assessors of Skowhegan, 329 A.2d 167 (Me. 1974) (“Unless it was error of law for the assessors to employ the appraisal approach which they used, it was the burden of the taxpayer in the Court below to establish by a fair preponderance of the evidence, that (a) The conclusion as to value reached by the assessors was so unreasonable in the light of circumstances that the property was substantially overvalued and injustice resulted, or (b) that the assessment was in some way fraudulent, dishonest or illegal.”));

Massachusetts (*see* Donlon v. Bd of Assessors of Holliston, 453 N.E.2d 395, 401 (Mass. 1983) (“where the taxpayer introduces persuasive evidence of overvaluation, a decision of the board in favor of the assessors must be supported by substantial evidence.... The taxpayer may present persuasive evidence of overvaluation either by exposing flaws or errors in the assessors’ method of valuation, or by introducing affirmative evidence of value which undermines the assessors’ valuation”) (citations omitted));

New Jersey (*see* Cohn v. Livingston Township, 18 N.J. Tax 429 (1999) (“There is a presumption of correctness in favor of the [county board of taxation’s] aforementioned 1996 judgment, which can be “overcome by sufficient competent evidence of true value of the property.”). Similarly, there is a presumption of validity that attaches to the 1997, 1998, and 1999 assessments which also may be overcome “by offering evidence of the true value of the property ‘based on sound theory and objective data, rather than on mere wishful thinking.’” *Id.* (citing *Atlantic City v. Ace Gaming, LLC*, 23 N.J. Tax 70 (2006) (citations omitted)). “The Tax Court may consider reliable evidence from a *pro se* litigant, even though such evidence is not derived from expert opinion.” *Id.*

New Mexico (*see* Hannahs v. Anderson, 966 P.2d 168, 174 (N.M. 1998) (“Taxpayers challenging their assessments have burden of rebutting presumption that assessor’s valuation is correct by showing that assessor did not follow statutory provisions or by presenting evidence tending to dispute factual correctness of valuation.”); *see also* Protest of Plaza Del Sol Ltd. P’ship v. Assessor for Bernalillo, 717 P.2d 1123 (N.M. Ct. App. 1986) (“A review board hearing a taxpayer’s protest sits in a quasi-judicial capacity, and in arriving at a change of valuation, its decision must be based upon competent evidence.”));



is a powerful indication that fundamental fairness leads toward the conclusion that the imposition of a heightened clear and convincing standard by West Virginia is improper and unfair.

*E. In Bayer MaterialScience, the Court Failed to Address Bayer's Arguments and Evidence*

The first striking aspect of the court's decision in *Bayer MaterialScience* is that the court significantly misstated Bayer's arguments as to the proper standard of proof. The court incorrectly stated that "Bayer asserts that requiring taxpayers to prove by clear and convincing evidence the erroneousess of their tax assessments is unconstitutional *because the Tax Commissioner is not*

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Ohio (*see* *Springfield Local Bd. of Educ. v. Summit Cnty. Bd. of Revision*, 628 N.E.2d 1365 (Ohio 1994) ("Neither a property valuation of a county auditor nor that of a board of revision is entitled to a presumption of validity. A taxpayer has the initial burden to establish the right to a reduction when challenging a county auditor's property valuation."); *see also* *Amsdell v. Cuyahoga Cnty. Bd. of Revision*, 574, 635 N.E.2d 11 (Ohio 1994) ("The auditor's duty to defend his valuation is triggered once the taxpayer does present competent, probative evidence to support a right to a reduction"));

Oklahoma (*see* *Park East Ltd. Co. v. Gordon*, 82 P.3d 1031 (Okla. Civ. App. 2003) ("[B]y statute, a taxpayer can appeal a decision of a county BOE to a district court *de novo*, which has been interpreted as eliminating the presumption that the assessment is correct when the taxpayer appeals (but not when the assessor appeals). The burden is on the taxpayer appellant to produce competent evidence to justify a change in value."));

Pennsylvania (*see* *Jackson v. Bd. of Assessment Appeals of Cumberland Cnty*, 950 A.2d 1081 (Pa. Commw. Ct. 2008); 72 PA. CONS. STAT. § 5020-518.1 ("[T]he taxing authority first presents its assessment record into evidence, establishing the presumed validity of the assessment; the burden then shifts to the taxpayer to present sufficient competent, credible and relevant evidence of the fair market value of the property to overcome the taxing authority's assessment records, and if the taxpayer does so, the tax assessment record loses the weight previously afforded to it and the taxing authority can no longer rely solely on the assessment record unless it is willing to run the risk of having the trial court believe the taxpayer's proof."));

South Dakota (*see* *Burke v. Butte Cnty.*, 640 N.W.2d 473 (S.D. 2002); S.D.CODIFIED LAWS 10-6-33, 10-6-33.1. ("There is a presumption that tax officials act in accordance with the law and not arbitrarily or unfairly when assessing property, and the taxpayer bears the burden to overcome this presumption; to do so, taxpayer must produce sufficient evidence to show the assessed valuation was in excess of true and full value, lacked uniformity in the same class, or was discriminatory."));

Vermont (*see* 32 VT. STAT. §§ 4461, 4467; *Jeffer v. Chester*, 417 A.2d 937 (Vt. 1980) ("Once town introduces appraisal of taxpayer's property into evidence in tax appeals, burden is on taxpayer to overcome presumption and burden can be satisfied by introduction of credible evidence fairly and reasonably tending to show that property is assessed at more than fair market value or that assessment is at higher percentage of fair market value than comparable properties."))

Wisconsin (*see* WIS. STAT. § 70.47(8)(i); *ABKA Ltd. v. Bd. of Review of Vill. of Fontana-On-Geneva Lake*, 603 N.W.2d 217 (Wis. 1999) ("The board shall presume that the assessor's valuation is correct. That presumption may be rebutted by a sufficient showing by the objector that the valuation is incorrect.")).

held to a corresponding standard”<sup>412</sup> and again when it noted that “Bayer’s assignment of error on this point challenges both its burden of proof, *i.e.*, by clear and convincing evidence, and its burden of persuasion insofar as neither the Tax Commissioner nor the Assessor are required to prove the correctness of their assessments.”<sup>413</sup>

As was discussed previously, Bayer asserted that the clear and convincing standard of proof *per se* results in a denial of due process. By contrast, the Foster Foundation argued that the relative burdens of production were unfair; that is, that it was unfair to require the taxpayer to introduce a written appraisal by a licensed professional real estate appraiser and present that appraiser’s testimony, while requiring the Assessor to present only oral testimony of an unlicensed person and while requiring the County Commission to produce no evidence to support the value that it ultimately selected, apparently out of thin air.

Since Bayer didn’t object to the disparate burdens of production, there was no reason for the court to address this issue in *Bayer MaterialScience*. Yet the court did exactly that, and in the process introduced confusing new terminology—the burden of persuasion:

We have repeatedly recognized, though, that it is customary to require the party seeking relief to carry the burden of persuasion: “[i]t is a well-established rule of law that in civil actions the party seeking relief must prove his right thereto.” *Boury v. Hamm*, 156 W.Va. 44, 52, 190 S.E.2d 13, 18 (1972). Accordingly,

when a plaintiff comes into court in a civil action he must, to justify a verdict in his favor, establish his case . . . . The burden of proof, meaning the duty to establish the truth of the claim . . . , rests upon him from the beginning, and does not shift, as does the duty of presenting all the evidence bearing on the issue as the case progresses.

*Burk v. Huntington Dev. & Gas Co.*, 133 W.Va. 817, 830, 58 S.E.2d 574, 581 (1950), modified on other grounds, *Foster v. City of Keyser*, 202 W.Va. 1, 501 S.E.2d 165 (1997). See also *Mayhew v. Mayhew*, 205 W.Va. 490, 497 n. 15, 519 S.E.2d 188, 195 n. 15 (1999) (explaining differences between burden of proof and burden of persuasion).<sup>414</sup>

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<sup>412</sup> *Bayer MaterialScience, LLC v. State Tax Comm’r*, 672 S.E. 2d 174, 185 (W. Va. 2008) (emphasis added).

<sup>413</sup> *Id.* (emphasis added).

<sup>414</sup> *Id.*

*Mayhew v. Mayhew* explained the difference between the burden of persuasion and the burden of production, a distinction that the court failed to grasp. Neither Bayer nor the Foster Foundation objected to the fact that the taxpayer bears the burden of proof/burden of persuasion, nor did either object to the fact that the taxpayer bears the initial burden of production to establish that the Assessor or Tax Commissioner's value is excessive. Finally, neither suggested that that burden of proof/burden of persuasion ever shifted to the taxing authority. As explained above, however, according to *Pocahontas Land*, the burden of production does shift to the taxing authority once the taxpayer meets its burden of production to show that the assessment is excessive. Just as the conclusion that the burden of proof/burden of persuasion doesn't shift to the taxing authority failed to address the Foster Foundation's claim that the disparate burdens of *production* were unfair, that conclusion sheds no light on Bayer's claim that the standard of proof violates due process.

Unlike the taxpayer in *Foster Foundation*, in *Bayer MaterialScience* Bayer did assert, at every step in the process, that the clear and convincing standard of proof violates due process. It argued that a careful reading of the West Virginia Supreme Court's earlier case law showed that the court distinguished between the standard of proof before a board of equalization and review and the standard of review before a circuit court, and that it was only in the court's later cases where that distinction became much less clear. Therefore, it urged the Supreme Court to reaffirm its syllabus point in *Killen* holding that the preponderance of the evidence standard is applicable before a board of equalization and review. In *Foster*, the court ignored this argument and simply found that its prior case law was inconsistent and overruled *Killen* and *Eastern American Energy*.

Bayer also asserted that, under the United States Supreme Court's decision in *Concrete Pipe* that there is "a substantial question of procedural fairness under the Due Process Clause" where, as here, a challenging party is required to show the "findings to be either 'unreasonable or clearly erroneous'" at the first level of adjudication,<sup>415</sup> and that, as where "possible bias" exists, applying a heightened standard of proof "deprive[s] [the challenging party] of the impartial adjudication in the first instance to which it is entitled under the Due Process Clause."<sup>416</sup> Bayer clearly demonstrated the bias of the Kanawha County Commission, both with references to a county commission's constitutional and statutory fiscal responsibilities, and with quotes to the transcript showing at least one county commissioner's overriding focus on those responsibilities.<sup>417</sup> In *Foster*, the court correctly observed that *Concrete Pipe* justified a conclusion that there was nothing unconstitutional about requiring the taxpayer to bear the *burden of*

<sup>415</sup> *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 626 (1993) (emphasis added) (citation omitted).

<sup>416</sup> *Id.* (emphasis added) (citation omitted).

<sup>417</sup> See Brief of Appellants at 22–25, *Bayer MaterialScience, LLC v. State Tax Commissioner*, 672 S.E.2d 174 (W. Va. 2008) (No. 33881).

proof, but then overlooked the section in *Concrete Pipe* dealing with the *standard* of proof.

In contrast to the *Foster* case, then, Bayer presented the West Virginia Supreme Court with a fully developed record in which the issue of the constitutionality of the heightened standard of proof had been raised and argued at every level. The court had before it the arguments of counsel and the opinion of the circuit court on this issue specifically. In the end, however, the court addressed none of the arguments or evidence adduced by Bayer that had not been advanced in *Foster*. Instead, in its *per curiam* decision, the court simply recited that in *Foster* it “determined . . . that the burden of proof a taxpayer challenging an erroneous tax assessment must sustain is by clear and convincing evidence, not by a preponderance of the evidence . . . .”<sup>418</sup> It then observed that

[w]e also considered, in *Foster*, a constitutional challenge that is identical to that raised by Bayer in the case *sub judice*, *i.e.*, whether requiring an appealing taxpayer to prove his/her claim for relief by clear and convincing evidence denies him/her due process. In *Foster*, we found no denial of due process and concluded that requiring an appealing taxpayer to prove his/her entitlement to relief by clear and convincing evidence was constitutional:

Requiring a taxpayer challenging a [generally accepted appraisal practice] property tax assessment in accordance with W. Va. Code § 11-3-24 (1979) (Repl. Vol. 2008) to prove by clear and convincing evidence that the assessor's assessment is erroneous does not violate the constitutional due process protections provided by section one of the Fourteenth Amendment to the United States Constitution or by section ten of Article III of the West Virginia Constitution.<sup>419</sup>

Finally, the court held that

Applying this holding to the case *sub judice*, we likewise find no constitutional infirmity with the clear and convincing burden of proof required to be borne by Bayer in challenging its tax assessments. Because it was proper to require Bayer to prove that its tax assessments were erroneous by clear and convincing evidence and because it was not denied due process by requiring it to satisfy this burden of proof, we affirm the circuit court's rulings insofar as they determined that Bayer was not denied due

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<sup>418</sup> *Bayer MaterialScience*, 672 S.E.2d at 185 (citing Syl. pt. 5, *In re Tax Assessment of Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150 (W. Va. 2008)).

<sup>419</sup> *Id.* at 186 (citing Syl. pt. 6, *Foster*, 672 S.E.2d 150).

process of law in the underlying proceedings challenging the correctness of its tax assessments.<sup>420</sup>

In summary, the court in *Foster* had no reason to address whether the imposition of the heightened clear and convincing standard of proof *per se* constitutes a denial of due process, because the Foster Foundation did not raise or argue that issue. Rather, the court in *Foster* should have ruled that neither the Assessor nor the County Commission adequately supported their values and should have reversed the decision of the circuit court on that basis alone. It should have left the issue of the unfairness of the disparate standards of proof that actually was raised by the Foster Foundation to a later day—although, it has, in effect, done so by the sheer incomprehensibility of its decision in that regard.

In *Bayer MaterialScience*, where the issue of whether the imposition of the heightened clear and convincing standard of proof *per se* constitutes a denial of due process was raised, argued, and fully briefed, the court should have balanced the factors identified by the United States Supreme Court in *Eldridge* and concluded that there is no reason to impose a higher standard of proof on either party, and that the taxpayer has the burden of proving by a simple preponderance of the evidence that the taxing authority's assessment is excessive. Such an outcome would have been consistent with the rule in the vast majority of jurisdictions in the United States. More careful legal research and precise usage of the terms "burden of proof," "standard of proof," and "standard of review" and a coherent discussion of how these terms are related would have been desirable as well.

*F. Recent Cases Affirming the Holding in Bayer MaterialScience and Foster*

On several occasions since the decisions in *Bayer MaterialScience* and *Foster* were released, the court has reaffirmed that the clear and convincing standard of proof is applicable in hearings before a county commission sitting as a board of equalization and review in valuation appeals.<sup>421</sup> Also, in *Bayer*

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<sup>420</sup> *Id.*

<sup>421</sup> See, e.g., *Tax Assessment Against Purple Turtle, LLC v. Gooden*, 679 S.E.2d 587, 594 n.8 (W. Va. 2009) ("If subsequent litigation of the tax assessment on the subject property is undertaken, the trial court should remain cognizant of the evidentiary principles announced by this Court in the recent opinions of *In re Tax Assessment of Foster Found. Woodlands Ret. Cmty.*, 223 W.Va. 14, 672 S.E.2d 150 (2008), and *Bayer MaterialScience, LLC v. State Tax Comm'r*, 223 W.Va. 38, 672 S.E.2d 174 (2008), requiring that a taxpayer challenging an assessment must prove by clear and convincing evidence that the assessment is erroneous."); *Stone Brook Ltd. v. Sisinni*, 688 S.E.2d 300 (W. Va. 2009) ("The burden is on the taxpayer challenging the assessment to demonstrate by clear and convincing evidence that the tax assessment is erroneous." Syl. pt. 2, in part, *Western Pocahontas Props., Ltd. v. County Comm'n of Wetzel County*, 189 W.Va. 322, 431 S.E.2d 661. Accord Syl. pt. 7, *In re Tax Assessments Against Pocahontas Land Co.*, 172 W.Va. 53, 303 S.E.2d 691 ("It is a general rule that valuations for taxation purposes fixed by an assessing

*Corp.*, the court held that “a taxpayer seeking relief from an erroneous tax assessment under W. Va.Code § 11-3-27 (2000) (Repl.Vol.2008) (commonly known as an exoneration), must establish entitlement to relief by clear and convincing evidence.”<sup>422</sup>

In each of those cases, however, Justice Benjamin reaffirmed his belief that there is no justification for applying a higher standard of proof on the taxpayer than applies to the taxing authorities. For example, in a concurring opinion in *Tax Assessment Against Purple Turtle, LLC v. Gooden*, *supra*, he explained:

I write separately, however, to again underscore my disagreement with the continuing disparity which currently exists regarding the proof burdens of the State and of its citizens in property tax assessment cases in West Virginia.FN1 Absent reliance on some vague statist doctrine of a superceding governmental entitlement to the fruits of one's labors, there is no compelling or even rational basis to permit the State a lesser burden of proof in the taking of a citizen's property (in the form of tax payments) than there is for the citizen in keeping his or her property.

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officer are presumed to be correct. The burden of showing an assessment to be erroneous is, of course, upon the taxpayer, and proof of such fact must be clear.”); *Mountain Am., LLC v. Huffman*, 687 S.E.2d 768, 783 (W. Va. 2009). Syllabus point 6 of *Mountain America* quotes Syllabus point 6 of *Foster* (“Requiring a taxpayer challenging a property tax assessment in accordance with W. Va.Code § 11-3-24 (1979)(Repl. Vo. 2008) to prove by clear and convincing evidence that the assessor’s assessment is erroneous does not violate the constitutional due process protections provided by section one of the Fourteenth Amendment to the United States Constitution or by section ten of Article III of the West Virginia Constitution.”). Syllabus point 9 of *Mountain America* quotes syllabus point 8 of *Bayer MaterialScience* (“As a general rule, there is a presumption that valuations for taxation purposes fixed by an assessor are correct . . . . The burden is on the taxpayer challenging the assessments to demonstrate by clear and convincing evidence that the tax assessment is erroneous.” Syllabus point 2, in part, *W. Pocahontas Prop. Ltd. v. C’nty. Commission of Wetzel County*, 189 W.Va. 322, 431 S.E.2d 661 (1993).”). Finally, syllabus point 10 of *Mountain America*, quotes syllabus point 5 in *Foster*.

<sup>422</sup> *State ex rel. Prosecuting Attorney of Kanawha Cnty. v. Bayer Corp.*, 672 S.E.2d 282, 291 (W. Va. 2008). Note that *Bayer Corp.* and *Foster* were decided on the same day. Consequently, the issue of the proper standard of proof didn’t get a lot of attention in the exoneration case:

We have recently held that a party challenging a tax assessment under W. Va.Code § 11-3-24 (1979) (Repl.Vol.2008) must show by clear and convincing evidence that he/she is entitled to relief. See Syl. pts. 5 & 6, *In Re: Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W.Va. 14, 672 S.E.2d 150 (2008). We can discern no justification for applying separate burdens of proof for assessment issues raised under W. Va.Code § 11-3-24 and assessment issues brought under W. Va.Code § 11-3-27. Consequently we hold that a taxpayer seeking relief from an erroneous tax assessment under W. Va.Code § 11-3-27 (2000) (Repl.Vol.2008), must establish entitlement to relief by clear and convincing evidence.

*Id.*

FN1. Pursuant to this Court's decision in *In re Tax Assessment of Foster Foundation's Woodlands Retirement*, 223 W.Va. 14, 672 S.E.2d 150 (2008), the State need only meet a preponderancy burden of proof in tax assessment cases, whereas a citizen seeking to keep his property (in the form of tax payments) must meet a higher clear and convincing burden of proof. *Foster Foundation's Woodlands*, at Syl. Pt. 5. As set forth in my dissenting opinion therein, I believe such a disparity is constitutionally impermissible. *In re Tax Assessment of Foster Foundation's Woodlands Retirement*, *supra* (J. Benjamin, dissenting).<sup>423</sup>

And in *Mountain America*, Justice Benjamin, writing for the majority, adhered to the majority rule, although he did add a note stating that "while the author of this opinion may personally disagree with the clear and convincing burden of proof standard imposed upon taxpayers appealing ad valorem property tax assessments, it is observed that the instant case is governed by the principles of stare decisis."<sup>424</sup> So far, however, he has been unable to persuade any other justices to adopt his view on this point.

#### G. *Changes to the Standard of Proof in SB 401*

West Virginia Code section 11-3-25(e) now provides that "[a]ll persons applying for relief to the circuit court under this section shall be governed by the same presumptions, burdens and standards of proof as established by law for taxpayers applying for such relief." In other words, the Legislature explicitly assured county officials that their unfair advantage in the applicable presumptions and standards of proof will continue unchanged.

### V. THE STANDARD OF REVIEW BEFORE A CIRCUIT COURT IN CERTIORARI

In *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, the court specified in detail the procedure for obtaining judicial review of an adverse ruling by a board of equalization and review in a valuation appeal:

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<sup>423</sup> *Gooden*, 679 S.E.2d at 594; *see also* *Stone Brook Ltd. v. Sisinni*, 688 S.E.2d 300, 316 (W. Va. 2009) (Benjamin, J., concurring) ("I again write separately to underscore my belief that the disparity regarding the proof burdens of the State and of its citizens in property tax assessment cases in West Virginia is constitutionally impermissible."); *Bayer Corp.*, 672 S.E.2d at 297 ("For the reasons set forth in my dissenting opinion in *In re Tax Assessment of Foster Foundation's Woodlands Retirement*, No. 33891, I respectfully concur and dissent in this case. I believe that the proper burden of proof for a taxpayer in a case such as this is that the taxpayer meet a 'preponderancy of the evidence' burden").

<sup>424</sup> *Mountain Am., LLC v. Huffman*, 687 S.E.2d 768, 782 n.18, citing *In re Tax Assessment of Foster Found. Woodlands Ret. Cmty.*, 672 S.E.2d 150, 152 (W. Va. 2008) (Benjamin, J. dissenting)).

Upon receiving an adverse determination before the county commission, a taxpayer has a statutory right to judicial review before the circuit court. W. Va. Code § 11-3-25 (1967). The statute provides little in the way of guidance as to the scope of judicial review, although it does expressly limit review to the record made before the county commission. Given this limitation, we have previously indicated that review before the circuit court is confined to determining whether the challenged property valuation is supported by substantial evidence, *see Killen v. Logan County Comm'n*, 170 W. Va. 602, 295 S.E.2d 689 (1982), or otherwise in contravention of any regulation, statute, or constitutional provision, *see In re Tax Assessments Against the Southern Land Co.*, 143 W. Va. 152, 100 S.E.2d 555 (1957), *overruled on other grounds, In re Kanawha Valley Bank*, 144 W. Va. 346, 109 S.E.2d 649 (1959). As this Court's previous cases suggest, and as we have recognized in other contexts involving taxation, *e.g., Frymier-Halloran v. Paige*, 193 W. Va. 687, 695, 458 S.E.2d 780, 788 (1995), judicial review of a decision of a board of equalization and review regarding a challenged tax-assessment valuation is limited to roughly the same scope permitted under the West Virginia Administrative Procedures Act, W. Va. Code ch. 29A.<sup>425</sup>

By contrast, the Court in *Bayer Corp.* ruled that “[u]nless otherwise provided by law, the standard of review by a circuit court in a writ of *certiorari*

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<sup>425</sup> *In re Tax Assessment Against Am. Bituminous Power Partners, L.P.*, 539 S.E.2d 757, 761–62 (W. Va. 2000) (footnotes omitted). W. VA. CODE § 29A-5-4 provides:

(f) The review shall be conducted by the court without a jury and shall be upon the record made before the agency, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken before the court. The court may hear oral arguments and require written briefs.

(g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because of the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.



proceeding under W. Va. Code § 53-3-3 (1923) (Repl. Vol. 2000) is *de novo*.<sup>426</sup> To reach that result, the court relied on the fact that the Legislature neglected to explicitly provide for an appeal to the circuit court in exoneration cases. In that situation, the circuit court hears the matter in certiorari—and ruled that, in certiorari, instead of a limited review only of the record made before the commission, the court is free to disregard the findings and conclusions made by the county commission and can conduct (at great expense to the taxpayer) an entirely new trial, and then is free to reach its own decision on the merits of the request for exoneration without paying any deference whatsoever to the decision of the tribunal charged by the Legislature with this issue.

Considering that the court in *Bayer Corp.* was able to “discern no justification for applying separate burdens of proof for assessment issues raised under W. Va. Code § 11-3-24 and assessment issues brought under W. Va. Code § 11-3-27,”<sup>427</sup> it is surprising that the court was able to discern a justification for entirely different standards of review for valuation and exoneration cases. This is particularly true given that in the 120 years since the Legislature first enacted statutes governing certiorari, the Supreme Court interpreted their purpose as being to diminish or eliminate the differences between appeals and proceedings in certiorari.

#### A. The Meaning of the Term “*De Novo*”

In *Bayer Corp.*, the court explained that “[d]e novo refers to a plenary form of review that affords no deference to the previous decisionmaker.”<sup>428</sup>

This definition is incomplete. The West Virginia case quoted by the Court more completely explained all of the aspects of a *de novo* review:

The term “*de novo*” means “[a]new; afresh; a second time.” *Frymier-Halloran v. Paige*, 193 W.Va. 687, 693, 458 S.E.2d 780, 786 (1995) (quoting Black’s Law Dictionary 435 (6th ed. 1990)). The term “hearing *de novo*” means “[g]enerally, a new hearing or a hearing for the second time, contemplating an *entire trial* in same manner in which matter was originally heard and a review of previous hearing. Trying matter anew the same as if it had not been heard before and as if no decision had been previously rendered. On hearing ‘*de novo*’ court hears matter as court of original and not appellate jurisdiction.” Black’s Law

<sup>426</sup> Syl. pt. 2, *State ex rel. Prosecuting Attorney of Kanawha Cnty. v. Bayer Corp.*, 672 S.E.2d 282, 284 (W. Va. 2008).

<sup>427</sup> *Id.* at 291.

<sup>428</sup> *Id.* at 289 n.10 (quoting *W. Va. Div. of Env’tl. Prot. v. Kingwood Coal Co.*, 490 S.E.2d 823, 834 (W. Va. 1997)).

Dictionary 721 (6th ed.1990). (citations omitted and emphasis added).

As stated above, at a *de novo* hearing before the Board, it not only considers the complete record which was before the DEP, but it is also authorized to “take such additional evidence as it considers necessary[.]”<sup>429</sup>

Under this more complete definition of the term, the result of the decision in *Bayer Corp.* is that a circuit court reviewing a decision of a county commission in certiorari has the authority to review the record made before the county commission, to take new evidence as it sees fit on the merits of the case, and to make its own findings of fact and conclusions of law without any deference to the findings and conclusions of the county commission. This interpretation of the scope of review in a proceeding in certiorari, however, is in direct conflict with the court’s earlier case law indicating that a circuit court should defer to the findings of fact and conclusions of law and cannot conduct a trial *de novo*. Moreover, it conflicts with the court’s earlier case law indicating that, when reviewing a decision rendered in a quasi-judicial proceeding conducted by one of the other branches of government, such deference is mandated by the separation of powers provision of the West Virginia Constitution.

*B. Early Case Law in West Virginia on the Scope of Review*

West Virginia Code section 53-3-3 (2010) describes the scope of review in proceedings in certiorari in somewhat cryptic language:

Upon the hearing, such circuit court shall, in addition to determining such questions as might have been determined upon a certiorari as the law heretofore was, review such judgment, order or proceeding, of the county court, council, justice or other inferior tribunal upon the merits, determine all questions arising on the law and evidence, and render such judgment or make such order upon the whole matter as law and justice may require.

This statutory language was first enacted in 1882, and this section was amended into its current form in 1889. The Supreme Court has had no shortage of opportunities to explain what this cryptic language means.

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<sup>429</sup> *W. Va. Div. of Envtl. Prot.*, 490 S.E.2d at 834 (emphasis added).

### 1. The Effect of the Certiorari Statutes

At common law, there were significant differences between appeals, writs of error, and writs of certiorari. Relatively speaking, proceedings in certiorari were “cumbersome” and required bills of exceptions or certificates in lieu thereof.<sup>430</sup> In 1889, the West Virginia Supreme Court, in *Alderson v. Commissioners*<sup>431</sup>, explained how the writ had been used earlier under common law, and the effect of the certiorari statutes:

As expressing the law elsewhere, and I think in this state, too, I quote section 4, tit. “Certiorari,” 3 Amer. and Eng. Cyclop. Law, 62, sustained by authorities of many states: “When its scope is not enlarged by statute, *certiorari lies only to correct errors in law, and not to review the evidence*. According to the better view, however, it is proper to inquire whether there was any evidence to establish some essential fact, and also as to the rulings below upon the admission of alleged incompetent evidence, where no other and competent evidence was introduced tending to prove a necessary finding. But *the record of an inferior court or other tribunal of matters in its jurisdiction cannot be disputed by other evidence, nor its finding of facts, when supported by any competent evidence*.”

Thus stood the law up to the passage of chapter 153, Acts 1882; Code 1887, p. 742. Certiorari was not wide enough in its efficacy as a remedial writ; certainly, at least, it can be said there was doubt as to its scope. It was to cover a field for the correction of errors not covered by the writ of error or appeal. *Why should it not afford, in its field of operation, the same relief against erroneous finding on the evidence as would be afforded by a writ of error on a motion for a new trial, on the ground that the finding was without sufficient evidence or contrary to the evidence? To give it such efficiency, to remove all doubt as to its reach, that act was passed.*<sup>432</sup>

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<sup>430</sup> See *Richmond v. Henderson*, 37 S.E. 653, 657 (W. Va. 1900). Although West Virginia Code section 53-3-3 still requires bills of exception or certificates in lieu thereof, the requirement for both has been superseded by Rules 80 and 81 of the Rules of Civil Procedure. See *Louk v. Cormier*, 622 S.E.2d 788 (W. Va. 2005); *State ex rel. Withers v. Bd. of Educ. of Mason Cnty.*, 172 S.E.2d 796 (W. Va. 1970).

<sup>431</sup> 9 S.E. 863 (W. Va. 1889).

<sup>432</sup> *Id.* at 865. (emphasis added).

In *Bayer Corp.* the court cited the 1982 case of *Harrison v. Ginsberg*,<sup>433</sup> which described the history of the statute in similar fashion:

Originally the writ of certiorari existed as a limited remedy and served primarily as a means of reviewing the actions of inferior tribunals to determine if they had exceeded their jurisdiction. In 1882, however, the Legislature substantially broadened the application of the writ, and the extent of review it affords, with the enactment of the language we now find in W. Va.Code § 53-3-3 . . . . Although this statutory language caused some confusion in the early years after its enactment, it was generally recognized that the statute substantially expanded the scope of review of the circuit court, giving it the power to rehear the issues *on the evidence certified from the inferior tribunal*.<sup>434</sup>

These cases demonstrate that for about 100 years, the court has consistently interpreted the statutory language as giving the circuit court jurisdiction—which it lacked under common law—to review the evidence as well as the law in proceedings in certiorari.

There is also a line of cases in which the court has held that the purpose of the statute was to diminish the differences between the writ of error and the writ of certiorari. In these, it has described the writ of certiorari as “an appellate writ, the counterpart of the writ of error”<sup>435</sup> and as “an appellate process, designed to effect the ends of justice . . . .”<sup>436</sup> The court has also declared that “[t]rue, the certiorari is tried by the record but it is only another name for appeal . . . .”<sup>437</sup> In at least one case, in fact, the court has permitted a proceeding improperly filed as a proceeding in certiorari to be treated as an appeal by the circuit court.<sup>438</sup>

If, as these cases indicate, a proceeding in certiorari is an appellate proceeding, it follows that it cannot be conducted *de novo*, since a *de novo* proceeding is an exercise of the circuit court’s original, not appellate, jurisdiction.<sup>439</sup> In exercising its appellate jurisdiction, the circuit court must defer to the findings of the inferior tribunal, at least if the inferior tribunal is in another branch of government. For example, in a case involving a statutory provision authorizing

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<sup>433</sup> 286 S.E.2d 276, 282 (W. Va. 1982) (internal citations omitted).

<sup>434</sup> *State ex rel. Prosecuting Attorney of Kanawha Cnty. v. Bayer Corp.*, 672 S.E.2d 282, 289 n.11 (W. Va. 2008) (emphasis added) (quoting *Harrison*, 286 S.E.2d at 282).

<sup>435</sup> *Morgan v. Ohio River R. Co.*, 19 S.E. 588, 589–90 (W. Va. 1894).

<sup>436</sup> Syl. pt. 1, *Michaelson v. Cautley*, 32 S.E. 170 (W. Va. 1898).

<sup>437</sup> *McClure-Mabie Lumber Co. v. Brooks*, 34 S.E. 921, 921–22 (W. Va. 1899).

<sup>438</sup> See *Harbert v. Monongahela River R. Co.*, 40 S.E. 377 (W. Va. 1901).

<sup>439</sup> *West Virginia Div. of Env'tl. Prot. v. Kingwood Coal Co.*, 490 S.E.2d 823, 834 (W. Va. 1997).

circuit court review of the State Water Commission's determinations, the West Virginia Supreme Court recognized that "[w]hether the proceeding before the court be regarded as certiorari or appeal, the court cannot substitute its discretion for that of the commission lawfully exercised."<sup>440</sup> Instead,

it was the duty of the circuit court under [the statute], as it would have to do in the event there had been no statutory review and certiorari had been invoked to ascertain whether the commission's finding . . . was based upon an abuse of its power, or that the commission exceeded its power, or exercised it in an arbitrary manner; and whether [the statute] . . . is constitutional. . . If the finding of the commission is clearly wrong or against the preponderance of the evidence, the circuit court in the first instance must . . . set aside the finding . . .<sup>441</sup>

Taken together, these cases clearly indicate that the effect of the certiorari statutes has been to eliminate any differences in the scope of review in proceedings in certiorari and statutory appeals.

## 2. Cases Were to be Remanded, Not Retained and Tried *De Novo*

In *Alderson v. Commissioners* the court also ruled that "[t]he circuit court, where such further proceedings outside the record before it are necessary, cannot retain and try the cause, but must remand to the inferior tribunal for such proceedings."<sup>442</sup> It based this ruling on the fact that the statute

says the circuit court shall 'review' the judgment, not retry the case; the word 'review' seeming to mean that the circuit court should go over again just what the lower court had considered. It does not say that new evidence may be heard. To give the construction to the statute, that in every case where a judgment or order of an inferior tribunal is reversed the circuit court must retain and try the case *de novo*, would be productive of great inconvenience.<sup>443</sup>

In *Alderson*, the inferior tribunal was the County Court of Kanawha County. This point is important. The 1889 amendment added a clause to what is now West Virginia Code section 53-3-3:

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<sup>440</sup> *Danielley v. Princeton*, 167 S.E. 620, 622 (W. Va. 1933) (emphasis added).

<sup>441</sup> *Huntington v. State Water Comm'n*, 64 S.E.2d 225, 230 (W. Va. 1951) (emphasis added).

<sup>442</sup> Syl. pt. 2, *Alderson v. Comm'r*, 9 S.E. 863 (W. Va. 1889).

<sup>443</sup> *Id.* at 866.

[b]ut all such cases removed as aforesaid from before *a justice* to the circuit court, wherein the amount in controversy is more than fifteen dollars, and in which the judgment of the justice is set aside, shall be retained in such court and disposed of as if originally brought therein.<sup>444</sup>

Under the revised statute, then, whether a cause can be tried *de novo* in circuit court in proceedings in certiorari depends on whether it arose from within the judicial branch (from a justice of the peace) or from another branch of government. This interpretation is consistent with the separation of powers provision discussed below. In *Morgan v. Ohio River R. Co.*,<sup>445</sup> the court confirmed that

[t]he statute has not changed the law as to retaining the cause in the circuit court, *except as to certiorari from a justice's judgment*. The disposal of the whole case spoken of in the statute only refers to the case as made by the record as brought upon certiorari, and does not authorize a trial *de novo* on other evidence, *except in cases of judgment of justices*.<sup>446</sup>

*Alderson* stood as good law from the date that it was issued in 1889 until it was overruled in *Bayer Corp.* There, the court observed that

As indicated in *Harrison*, some of our early cases misconstrued the expansive reach of the statute. *See, e.g., Syl. pt. 2, Alderson v. Commissioners*, 32 W.Va. 454, 9 S.E. 863 (1889) (“The circuit court, where such further proceedings outside the record before it are necessary, cannot retain and try the cause, but must remand to the inferior tribunal for such proceedings.”).<sup>447</sup>

That observation would lead the reader to suppose that *Alderson* had long since been overturned, and that the *Harrison* court was acknowledging that fact, but that’s simply not the case.

It is true that in *Harrison*, the court did observe that the language in section 53-3-3 “caused some confusion in the early years after its enactment,”<sup>448</sup> but it didn’t cite *Alderson* for that proposition. Rather, the *Harrison* court cited *McClure-Mabie Lumber Co. v. Brooks*<sup>449</sup> in which the court, after quoting the

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<sup>444</sup> W. VA. CODE § 53-3-3 (2010) (emphasis added).

<sup>445</sup> 19 S.E. 588 (W. Va. 1894).

<sup>446</sup> *Id.* at 590.

<sup>447</sup> *State ex rel. Prosecuting Attorney of Kanawha Cnty. v. Bayer Corp.*, 672 S.E.2d 282, 289 n.11 (W. Va. 2008).

<sup>448</sup> *Harrison v. Ginsberg*, 286 S.E.2d 276, 282 (W. Va. 1982).

<sup>449</sup> 34 S.E. 921 (W. Va. 1899).

statutory language, said “[w]hat does this mean? I shall not say, it is hard to say . . . .”<sup>450</sup>

As discussed above, the Court in *McClure-Mabie* overcame its confusion and affirmed the similarity between writs of appeal and certiorari, observing that “[t]rue, the certiorari is tried by the record but it is only another name for appeal . . . .” It also cautioned that, while the statute “authorizes a liberality to cure such a defect as a defective or untruthful return”, it was also careful to explicitly state that it did “not say it allows new pleadings or evidence, or that the case must not be tried on the record . . . .”<sup>451</sup> Nothing in that case casts any doubt on the holding in *Alderson* that cases cannot be tried *de novo* by the circuit court. *McClure-Mabie* never mentioned, much less overruled, *Alderson*, which was still in effect after *Harrison* was decided and remained so until it was overruled in *Bayer Corp.*, apparently because the court misread its own prior case law.

### 3. All Issues Fairly Raised by the Record Can Be Reviewed

The case of *Davis v. Hix*<sup>452</sup> also sheds light on the meaning of the language in West Virginia Code section § 53-3-3. There, the West Virginia Supreme Court, identified an issue that was raised by the record in the case but that had not been addressed by the circuit court. The court remanded the case to the circuit court, with instructions to address the additional issue. In doing so, it quoted with approval the first point of the syllabus in *Alderson*:

Upon a writ of certiorari used as an appellate proceeding to bring to the circuit court for review a judgment or order of an inferior tribunal, the circuit court should decide all matters of law and fact, including those on the merits fairly arising on the record, either affirming such judgment or order, or reversing or modifying it, and render such judgment as the inferior tribunal should have rendered, *to that tribunal where further proceedings are necessary*, with distinct decision on the points involved in the latter event.<sup>453</sup>

Syllabus point 2 of *Hix* makes it clear that the court interpreted the statutory language as requiring a reviewing court to review all issues fairly raised in the record, but does not authorize the reviewing court to conduct a *de novo* review:

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<sup>450</sup> *Id.* at 922.

<sup>451</sup> *Id.* at 921–22.

<sup>452</sup> 90 S.E.2d 357 (W. Va. 1955).

<sup>453</sup> *Id.* at 361 (quoting *Alderson v. Comm’rs*, 9 S.E. 803 (W. Va. 1859)).

This Court, on writ of certiorari, as required by Article 7, Sections 27 and 30, of the Unemployment Compensation Law, as amended, will not dispose of questions which have not been decided by the trial court, but will remand the proceeding to such Court with directions to dispose of all questions fairly raised on the record.

4. The Standard of Review in Proceedings in Certiorari Is Similar to That in Appeals Under the APA

From the time they were enacted, then, the Supreme Court interpreted the certiorari statutes as diminishing if not eliminating the differences between proceedings in certiorari and appeals. The statute expanded the scope of the review to include a deferential examination of whether the evidence supported the result in the lower tribunal, but the Court specifically held that the statute did not authorize the reviewing court to hear the matter *de novo*. As recently as 2001, in *Adkins v. West Virginia Department of Education*,<sup>454</sup> the court has observed that the standards of review in circuit court in appeals conducted under the Administrative Procedures Act ("APA") and in proceedings in certiorari are virtually identical:

During oral argument before this Court, the circuit court's review of this case was discussed in terms of the State Administrative Procedures Act, W. Va. Code §§ 29A-5-1 to -5 (1964). However, since this case was brought before the circuit court on a writ of certiorari pursuant to W. Va. Code § 53-3-1, we need not discuss the applicability of that Act. *We note though that the standard of review under both statutes is essentially the same.* See W.Va.Code § 29A-5-4(g) (1998).<sup>455</sup>

This statement in *Adkins* is not on some peripheral matter; rather, the central holding in that case was that in that proceeding in certiorari, the inferior tribunal's decision was not arbitrary and capricious, and therefore the circuit court was not free to disregard it and substitute its own opinion for that of the Board of Education. The court was unanimous on this point.

The court in *Adkins* also observed that:

This Court has advised that a circuit court may not reverse a decision of an administrative agency simply because it would have decided the case differently. *Berlow v. West Virginia Bd. of Medicine*, 193 W.Va. 666, 672, 458 S.E.2d 469, 475 (1995). As we explained in Syllabus Point 3 of *In re Queen*, 196 W.Va.

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<sup>454</sup> 556 S.E.2d 72 (W. Va. 2001).

<sup>455</sup> *Id.* at 75 n.3 (emphasis added).



442, 473 S.E.2d 483 (1996), “the ‘clearly wrong’ and the ‘arbitrary and capricious’ standards of review are deferential ones which presume an agency’s actions are valid as long as the decision is supported by substantial evidence or by a rational basis.” Thus, “[t]he scope of review under the arbitrary and capricious standard is narrow, and a court is not to substitute its judgment for that of the hearing examiner.” *Martin v. Randolph County Bd. of Educ.*, 195 W.Va. 297, 304, 465 S.E.2d 399, 406 (1995).<sup>456</sup>

In other cases arising from proceedings in certiorari, the court has applied a standard of review similar to that mandated by the APA. In *Humphreys v. County Court of Monroe County*,<sup>457</sup> decided in 1922, the court explained that, upon writ of certiorari, deference is owed to a county commission’s (formerly, a county court’s) fact-finding in property tax exoneration proceedings.<sup>458</sup> In *Humphreys*, the court considered a circuit court’s judgment affirming, on writ of certiorari, the county court’s denial of a request for a tax exoneration.<sup>459</sup> The court reviewed the evidence presented to the County Court and concluded that “[t]he presumption in favor of correctness and regularity of the assessment was *clearly and fully rebutted* and overthrown by the admissible evidence . . . .”<sup>460</sup> In doing so, it overturned “the judgments of the circuit court and the county court [because they] are *clearly erroneous* . . . .”<sup>461</sup> *Humphreys* thus stands for the proposition that a circuit court, and this court, review a county commission’s factfinding in a tax exoneration with deference, overturning that factfinding only upon a showing that the facts found by the Commission be “clearly and fully rebutted[,]” i.e., that they are “clearly erroneous.”<sup>462</sup>

In *Beverlin v. Board of Education of Lewis County*,<sup>463</sup> after holding that the circuit court could hear, on certiorari review, a case first decided by the County Board of Education, this court explained that the “the sole significant issue” was whether the board “acted *arbitrarily and capriciously* in suspending and dismissing [plaintiff], considering the evidence placed in the record.”<sup>464</sup> On

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<sup>456</sup> *Id.* at 75.

<sup>457</sup> 110 S.E. 701 (W. Va. 1922).

<sup>458</sup> *Id.*; see also W. VA. CODE § 53-3-2 (2010) (setting forth types of cases reviewable upon certiorari); *Humphreys*, 110 S.E. 701 (recognizing that a county court acts judicially in deciding questions of taxability and exoneration, and accordingly review in the circuit court is available by writ of certiorari); cf. *Quesenberry v. State Rd. Comm’n*, 138 S.E. 362, 365 (W. Va. 1927) (holding that “[o]nly judicial or quasi judicial action is reviewable” upon certiorari).

<sup>459</sup> *Humphreys*, 110 S.E. at 702–03.

<sup>460</sup> *Id.* at 703 (emphasis added).

<sup>461</sup> *Id.* (emphasis added).

<sup>462</sup> *Id.*

<sup>463</sup> 216 S.E.2d 554 (W. Va. 1975).

<sup>464</sup> *Id.* at 557 (emphasis added).

several occasions, the Court has reaffirmed the holding in *Beverlin* that a circuit court can only reverse a decision of an inferior tribunal if it is arbitrary and capricious. For example, in *North v. West Virginia Board of Regents*,<sup>465</sup> the Court affirmed that *Beverlin* “established that on a writ of certiorari the court may review the action of the lower tribunal to determine if it acted in an arbitrary and capricious manner, and if it did, its actions will be reversed.”<sup>466</sup>

Also, in *Clarke v. West Virginia Board of Regents*,<sup>467</sup> the court held that the inferior tribunal must make sufficient findings to satisfy the reviewing circuit court that it “has fulfilled [its] obligations as a fact finder and has not acted arbitrarily and capriciously in reaching his conclusions”,<sup>468</sup> explaining that if the administrative record is deficient, the appeals courts are “powerless to review the administrative action” because they “are thrust into the position of a trier of fact and are asked to substitute [their] judgment for that of the hearing examiner,” which “[they] cannot do.”<sup>469</sup>

In addition, the West Virginia Supreme Court’s review of decisions from county zoning authorities reflects a deferential standard for reviewing the factual findings of quasi-judicial bodies upon certiorari review. The court long has recognized that zoning appeals boards—like the county commissions in a property tax appeal—act in a quasi-judicial function.<sup>470</sup> In *Wolfe v. Forbes*,<sup>471</sup> the court held that in reviewing that quasi-judicial tribunal’s findings, “on appeal there is a presumption that a board of zoning appeals acted correctly,” and that presumption may be overcome only “where the board has applied an erroneous principle of law, was *plainly wrong in its factual findings*, or acted beyond its jurisdiction.”<sup>472</sup> The court cited two Virginia cases<sup>473</sup> for this proposition, but did not cite W. Va. Code § 8-24-64, in effect since 1959, which likewise provided that “no such review shall be by trial *de novo*.” The court also stated that “the decision [of the Board of Zoning Appeals] to entertain a second application should not be disturbed by a reviewing court unless it is contrary to

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<sup>465</sup> 233 S.E.2d 411 (W. Va. 1977).

<sup>466</sup> *Id.* at 418–19; *See also* *Adkins v. West Virginia Dep’t of Educ.*, 556 S.E.2d at 74–75 (reiterating “this Court [has] established that on a writ of certiorari the court may review the action of the lower tribunal to determine if it acted in an arbitrary and capricious manner”) (citing *Beverlin*, 216 S.E.2d at 557).

<sup>467</sup> 279 S.E.2d 169 (W. Va. 1981).

<sup>468</sup> *Id.* at 177.

<sup>469</sup> *Id.* at 178.

<sup>470</sup> *See, e.g., Appalachian Power Co. v. Pub. Serv. Comm’n of W. Va.*, 296 S.E.2d 887, 889 (W. Va. 1982) (“We recognize that the Legislature may create an administrative agency and give it quasi-judicial powers to conduct hearings and make findings of fact without violating the separation of powers doctrine.”).

<sup>471</sup> 217 S.E.2d 899 (W. Va. 1975).

<sup>472</sup> *Id.* at 906 (emphasis added).

<sup>473</sup> *Azalea Corp. v. Richmond*, 112 S.E.2d 862 (Va. 1960); *C. & C., Inc. v. Semple*, 150 S.E.2d 536 (Va. 1966).

law or plainly wrong under the evidence,”<sup>474</sup> again citing two Virginia cases.<sup>475</sup> Also, in *Lower Donnelly Ass’n v. Charleston Municipal Planning Commission*,<sup>476</sup> the court stated that

the decision by the Legislature to make certiorari available for persons challenging decisions by the board of zoning appeals as well as to those persons challenging the decisions of planning commissions demonstrates that the Legislature sought to assert these powers in order to afford a remedy for the review of the record developed by these bodies as a convenient means of assuring adherence to the requirements of the law without necessarily providing a means of attacking their proper exercise of discretion.<sup>477</sup>

More recently, in *Corliss v. Jefferson County Board of Zoning Appeals*,<sup>478</sup> *Jefferson Utilities, Inc. v. Jefferson County Board of Zoning Appeals*,<sup>479</sup> *Maplewood Estates Homeowners Ass’n v. Putnam County Planning Commission*,<sup>480</sup> and *Far Away Farm, LLC v. Jefferson County Board of Zoning Appeals*,<sup>481</sup> the West Virginia Supreme Court confirmed the continuing vitality of the *Wolfe* standard in analyzing a circuit court’s review of zoning board decisions on writ of certiorari.<sup>482</sup> In all four cases, the court quoted the *Wolfe* standard: “While on appeal there is a presumption that a board of zoning appeals acted correctly, a reviewing court should reverse the administrative decision where the board has applied an erroneous principle of law, was *plainly wrong* in its *factual findings*, or has acted beyond its jurisdiction.”<sup>483</sup>

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<sup>474</sup> *Wolfe*, 217 S.E.2d at 903.

<sup>475</sup> *Tidewater Util. Corp. v. Norfolk*, 160 S.E.2d 799 (Va. 1968); *C. & C., Inc.*, 150 S.E.2d 536; Joseph T. Bockrath, Annotation, *Zoning Board’s Grant of New Application for Zone Change, Variance, or Special Exception After Previous Application Covering Same Property or Part Thereof*, 52 A.L.R.3d 494 (1973).

<sup>476</sup> 575 S.E.2d 233 (W. Va. 2002).

<sup>477</sup> *Id.* at 240 (emphasis added).

<sup>478</sup> 591 S.E.2d 93 (W. Va. 2003).

<sup>479</sup> 624 S.E.2d 873 (W. Va. 2005).

<sup>480</sup> 629 S.E.2d 778 (W. Va. 2006) (per curiam).

<sup>481</sup> 664 S.E.2d 137 (W. Va. 2008) (per curiam).

<sup>482</sup> These cases were reviewed by the circuit court under the authority granted by West Virginia Code section 8-24-59, which provided that “[e]very decision or order of the board of zoning appeals shall be subject to review by certiorari.” That provision has since been replaced by a substantially similar statute, West Virginia Code section 8A-9-1 (2010), which provides that “[e]very decision or order of the planning commission, board of subdivision and land development appeals, or board of zoning appeals is subject to review by certiorari.”

<sup>483</sup> *Corliss*, 591 S.E.2d at 97–98 (emphasis added); *Jefferson Utils.*, 624 S.E.2d at 877; *Maplewood Estates Homeowners Ass’n v. Putnam Cnty. Planning Co.*, 629 S.E.2d 778, 782 (W. Va. 2006); *Far Away Farms*, 664 S.E.2d at 141.

The court's decision in *Corliss* is particularly instructive. There, the court held that the circuit court committed reversible error by failing to give the County Board's decision sufficient deference.<sup>484</sup> The court concluded that by "discarding the administrative determinations that the submitted [evidence] was adequate, the lower court appears to have *wrongly substituted its judgment for that of the administrative entities charged with handling zoning matters.*"<sup>485</sup> The court added that "[i]t is axiomatic that 'interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.'"<sup>486</sup> In *Maplewood Estates*, the circuit court overturned a decision of the Putnam County Planning Commission in favor of the appellants, who appealed to the supreme court arguing that the findings of the Commission were not plainly wrong because they were supported by substantial evidence and asserting that the circuit court erroneously substituted its judgment for that of the Commission. The court agreed and reversed the circuit court, observing that

This Court has explained that "the plainly wrong standard of review is a deferential one, which presumes an administrative tribunal's actions are valid as long as the decision is supported by substantial evidence." *Conley v. Workers' Compensation Division*, 199 W.Va. 196, 199, 483 S.E.2d 542, 545 (1997). See also Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996); *Frymier-Halloran v. Paige*, 193 W.Va. 687, 695, 458 S.E.2d 780, 788 (1995). Substantial evidence is "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *In re Queen*, 196 W.Va. at 446, 473 S.E.2d at 487. A factual finding that is supported by substantial evidence is conclusive. *Id.* Consequently, "[n]either this Court nor the circuit court may supplant a factual finding of [the Commission] merely by identifying an alternative conclusion that could be supported by substantial evidence." *Id.*<sup>487</sup>

The court found that the appellants clearly satisfied the requirements for a subdivision variance and that the circuit court improperly substituted its own judgment for that of the Planning Commission.<sup>488</sup> Accordingly, the court re-

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<sup>484</sup> 591 S.E.2d at 98.

<sup>485</sup> *Id.* at 100 (emphasis added).

<sup>486</sup> *Id.* at 100–01 (ruling that "the lower court overlooked its duty to give the appropriate amount of deference to the administrative decision and Zoning Board's affirmation of that decision") (internal citation omitted); see also *id.* Syl. pts. 3 & 4; *Jefferson Utils., Inc. v. Jefferson Cnty. Bd. of Zoning Appeals*, 624 S.E.2d 873 (W. Va. 2005) ("As in *Corliss*, we are hard pressed not to conclude that the trial court wrongly refused to grant the appropriate amount of deference to one of the administrative bodies charged with responsibility for enforcing the Ordinance.").

<sup>487</sup> *Maplewood Estates Homeowners Ass'n v. Putnam Cnty. Planning Co.*, 629 S.E.2d 778, 782 (W. Va. 2006).

<sup>488</sup> *Id.* at 783.

manded the case to the circuit court with directions to enter an order reinstating the decision of the Putnam County Planning Commission that granted the requested subdivision variance.<sup>489</sup> These cases all stand for the proposition that the standard of review in circuit court is a deferential one and is not *de novo*.

### 5. Inconsistent Case Law

The West Virginia Supreme Court has not been entirely consistent in holding that a circuit court should defer to the findings of fact resulting from a quasi-judicial proceeding conducted by another branch of government. In 1996, in *Lipscomb v. Tucker County Commission*,<sup>490</sup> one issue was whether the circuit court had been correct to dismiss the claim since it had not been filed within 30 days as required by the APA.<sup>491</sup> The supreme court confirmed that when no provision for an appeal was provided by statute, a circuit court hears an appeal from a county commission in certiorari.<sup>492</sup> However, since the certiorari statutes do not limit the time during which a motion for a writ of certiorari can be filed, the court looked to the statutes that provide for an appeal to a circuit court from a decision of a circuit court in certain enumerated situations.<sup>493</sup> By analogy to West Virginia Code section 58-3-4 (2010), which provides that such appeal must be filed within four months after such judgment was rendered by the county commission, the court ruled that a motion for a writ of certiorari was not barred by the doctrine of laches if filed within four months of the county commission's decision.

The West Virginia Supreme Court remanded the case to the circuit court:

with directions that the court grant a writ of certiorari, directed to the County Commission, to bring the record of appellant's grievance, with all related papers, to the circuit court. The court may require appellant to file such additional pleadings, in the nature of an amended and supplemental petition, as it deems necessary to properly frame the issues. On consideration of the record made on the grievance, the court may take such additional evidence as may be required or remand the matter to the County Commission for that purpose.<sup>494</sup>

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<sup>489</sup> *Id.*

<sup>490</sup> 475 S.E.2d 84 (W. Va. 1996).

<sup>491</sup> *Id.* at 88.

<sup>492</sup> *Id.* at 89.

<sup>493</sup> *Id.*

<sup>494</sup> *Id.* at 90.

## 2011]DUE PROCESS IN WEST VIRGINIA'S PROPERTY TAX APPEALS SYSTEM 903

In other words, the court remanded the case to the circuit court with instructions to hold a de novo hearing or remand that case to the county commission; in fact, the circuit court conducted a jury trial on the merits of the case.<sup>495</sup> The court, however, didn't recognize that it had departed from the rule announced in *Wolfe*, nor did it cite *Beverlin*, or explain why it reached a completely contradictory result.

The 1996 *Lipscomb* decision, however, is in accord with the court's tendency to minimize the difference between appeals and proceedings in certiorari. That naturally raises the question of what the standard of review is applicable in an *appeal* of a decision of a county commission to the circuit court under the appeal statutes found at West Virginia Code section 58-3-1 et seq. The supreme court has not often addressed the proper standard of review in this context. However, in the 1903 case of *Sistersville Ferry Co. v. Russell*,<sup>496</sup> the court did say:

Russell makes the point that the circuit court upon the appeal erred in not sustaining a motion by him to grant him a jury trial of the merits, with right to produce additional evidence, and assess his damage . . . . An appeal taken from the county to the circuit court under Code, c. 39, §§ 47, 48 [now § 58-3-1 and 58-3-3], and chapter 112, § 14, is not an appeal in the ordinary sense of that word, importing a process in the superior court by which a new trial of fact is had upon evidence the same as used in the county court or new evidence; but it is *triable only on the record as made in the county court*. This is apparent from the statute and by the opinion in *Williamson v. Hays*, 25 W. Va. 614.<sup>497</sup>

There is also evidence that the legislature itself believes that de novo review is not available in statutory appeals of a decision of a county commission to a circuit court. In 1993, the legislature amended section 58-3-1 by adding a new type of case that could be appealed to the circuit court.<sup>498</sup> Subsection (f) now permits an appeal of "the disposition of disputes arising from the provisions of article three [Provisions Relating to Husband or Wife of Decedent], chapter forty-two [Descent and Distribution] of this code, which appeal shall be de novo."<sup>499</sup> Of the seven types of cases addressed by this section of the Code, this is the only one for which the legislature directed review "shall be de no-

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<sup>495</sup> See *Lipscomb v. Tucker Cnty. Comm'n*, 527 S.E.2d 171 (W. Va. 1999).

<sup>496</sup> 43 S.E. 107 (W. Va. 1903).

<sup>497</sup> *Sistersville Ferry Co.*, 43 S.E. at 108 (emphasis added).

<sup>498</sup> See W. VA. CODE § 58-3-1 (2006).

<sup>499</sup> See W. VA. CODE § 58-3-1(f) (2006).

vo.”<sup>500</sup> Leaving aside the question of whether the grant of authority in section 58-3-1 violates the Separation of Powers provision of the West Virginia Constitution, it is clear that, absent a specific grant of authority to the contrary, the Legislature does not contemplate that any of the other enumerated types of appeals to circuit court from a county commission can be tried *de novo*. By analogy, then, if the standard of review in appeals and proceedings in *certiorari* is similar, neither is *de novo*.

C. *Constitutional Issues: Separation of Powers*

The court’s prior holdings that *de novo* review is not permitted in proceedings in *certiorari* were not solely a matter of statutory interpretation. For more than 100 years, the court also recognized that the separation of powers provision in West Virginia Constitution article V, section 1 constrains the ability of circuit courts to review rulings from inferior tribunals that are not in the judicial branch of government.

1. Review of Decisions of Administrative Agencies

The *de novo* standard of review in circuit court of decisions of administrative agencies is inconsistent with separation of powers principles. In 1887, in *Poteet v. Cabell County Commissioners*,<sup>501</sup> the West Virginia Supreme Court examined several sections of the Constitution of West Virginia and related statutes and observed that all of these, taken together, could be interpreted as granting the circuit court authority to review “every possible case of any description, when the county court had made a final order[,] in any case or proceeding of any sort.”<sup>502</sup>

The West Virginia Supreme Court then observed:

But broad and comprehensive as is the provision of the [1880] constitution above quoted, as well as the laws intended to carry it into effect, stated above, still there are cases of final orders of a county court which cannot be reviewed by *certiorari*, or in any other manner, by the circuit court, because such final orders, or the proceedings in which they were entered, are *obviously not judicial in their character*. It is true, by article 5 of our constitution (see Warth's Amended Code, p. 11) it is provided that “the legislative, executive, and judicial departments

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<sup>500</sup> *Id.*

<sup>501</sup> 3 S.E. 97 (W. Va. 1887).

<sup>502</sup> *Id.* at 105.

shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others.”<sup>503</sup>

In *Poteet*, the court decided the county court’s power to investigate irregularities in voting and to rule on specific objections made that the county court’s rulings were judicial in nature, and therefore the court held that the circuit court had jurisdiction to hear the case in certiorari.<sup>504</sup>

Then, in the 1946 case of *State v. Huber*,<sup>505</sup> the court reviewed a statute giving circuit courts concurrent jurisdiction with the beer commissioner to revoke licenses to sell nonintoxicating beer. Upon such a revocation by the Circuit Court of Fayette County, the licensees appealed. The West Virginia Supreme Court considered the meaning of the terms “legislative power,” “executive power,” and “judicial power” and explained that

(i) “[u]nquestionably, the power of regulation of public utilities, the licensing of businesses of all kinds, the regulation of such businesses, the general control thereof, including the power of revoking licenses or permits issued in connection therewith, is a legislative power;”

(ii) “executive power is more limited: it merely extends to the detail of carrying into effect the laws enacted by the Legislature, as they may be interpreted by the courts;” and

(iii) “judicial power” included “the power which a regularly constituted court exercises in matters which are brought before it, in the manner prescribed by statute, or established rules of practice of courts, and which matters do not come within the powers granted to the executive, or vested in the legislative department of the Government.”<sup>506</sup>

The court then discussed the requirement that these powers be separated, observing that

[t]he separation of these powers; the independence of one from the other; the requirement that one department shall not exercise or encroach upon the powers of the other two, is fundamental in our system of government, State and Federal. Each acts, and is intended to act, as a check upon the others, and thus a balanced

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<sup>503</sup> *Id.* (emphasis added).

<sup>504</sup> *See id.* at Syl. pt. 1.

<sup>505</sup> 40 S.E.2d 11 (W. Va. 1946).

<sup>506</sup> *Id.* at 18.



system is maintained. No theory of government has been more loudly acclaimed.<sup>507</sup>

Applying these principles, this court highlighted the limited scope of judicial review of rulings by administrative or quasi-judicial bodies.

The court recognized that strict separation was not practicable because “there has grown up a proceeding, authorized by statute, and recognized by this Court which, by the employment of what may be termed a legal fiction, administrative boards, commissions and officials are treated as possessing quasi judicial power.”<sup>508</sup> Nevertheless, the court both defined the ability of courts to review such determinations and the limitations inherent in that review:

Apparently the law is settled in favor of the use of the appeal method, on the theory that duly constituted administrative boards and commissions do sometimes exercise quasi judicial power, and that, on that theory, there can be brought into play what is called judicial power. If there is an abuse of power; or if the power conferred by the Legislature be exceeded; or there is arbitrary or fraudulent exercise thereof; or any provision of the Constitution or the statute laws of the State is violated, a judicial question arises upon which the courts may pass judgment. But unless these administrative agencies are at fault in the respects noted above, their power to perform their functions, delegated to them by the Legislature, cannot be controlled by the courts; and, this being true, courts will not assume to exercise administrative power, *even though the Legislature may mistakenly authorize them to do so.*<sup>509</sup>

Two cases illustrate these principles in practice. First, in *Danielley v. City of Princeton*,<sup>510</sup> the West Virginia Supreme Court interpreted a statute that provided that “the circuit court shall review any order of the [state water] commission, and may hear and consider any pertinent evidence offered, etc., ‘and shall determine all questions arising on the law and evidence and render such judgment or make such order upon the whole matter, as law and equity may require.’”<sup>511</sup> The court interpreted this language (which is quite similar to the language in the certiorari statute) as requiring a decision on the merits of the case.<sup>512</sup> Since a decision on the merits would require the exercise of executive

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<sup>507</sup> *Id.*

<sup>508</sup> *State v. Huber*, 40 S.E.2d 11, 24 (W. Va. 1946).

<sup>509</sup> *Id.* (emphasis added).

<sup>510</sup> 167 S.E. 620 (W. Va. 1933).

<sup>511</sup> *Id.* at 622.

<sup>512</sup> *Id.* (citing *Alderson v. Comm’rs*, 9 S.E. 863 (W. Va. 1889)).

functions, the court held the entire act to be an unconstitutional violation of West Virginia's separation of powers:

*Whether the proceeding before the court be regarded as certiorari or appeal, the court cannot substitute its discretion for that of the commission lawfully exercised. The legislative, executive, and judicial powers, under the Constitution (article 5), are each in its own sphere of duty, independent of and exclusive of the other; so that, whenever a subject is committed to the discretion of the legislative or executive department, the lawful exercise of that discretion cannot be controlled by the judiciary.*<sup>513</sup>

Second, after the legislature amended the statutes invalidated by *Danielly*, the Court reviewed the amendments in *City of Huntington v. State Water Commission*.<sup>514</sup> As amended, the statute limited the circuit court's review in that the review was confined (i) to the record made below and (ii) to the question as to whether the act complained of constitutes pollution under the West Virginia Code.<sup>515</sup> The decision was to be certified back to the State Water Commission, which was to modify its order to be consistent with that of the circuit court.<sup>516</sup> This court held that the revised statute did not permit the circuit court to hear new evidence or conduct a trial *de novo* because, if the circuit court had that authority, it would violate the separation of powers principles inherent in West Virginia law.<sup>517</sup> To avoid that problem, this court limited the circuit court's review of the Water Commission's ruling to one requiring deference.<sup>518</sup>

The West Virginia Supreme Court has also applied separation of powers principles in the context of tax appeals. For example, in *Frymier-Halloran v. Paige*,<sup>519</sup> the supreme court found that a statute that permitted a circuit court to hear an appeal from a decision of the Tax Commissioner's Office of Hearings and Appeals "anew" violated West Virginia's separation of powers requirement.<sup>520</sup> Justice Cleckley's opinion explained that, once an administrative agency is created and is "assign[ed] adjudicatory decision making," courts "must defer to its decisions and cannot review factual determinations *de novo*."<sup>521</sup> The *Frymier-Halloran* court directed lower courts to be mindful that it is "estab-

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<sup>513</sup> *Id.* (emphasis added) (internal citations omitted).

<sup>514</sup> 64 S.E.2d 225 (W. Va. 1951).

<sup>515</sup> *Id.* at 226–27.

<sup>516</sup> *Id.* at 227.

<sup>517</sup> *Id.* at 230.

<sup>518</sup> *Id.* at 230–31.

<sup>519</sup> 458 S.E.2d 780 (W. Va. 1995).

<sup>520</sup> *Id.*

<sup>521</sup> *Id.* at 787 (citing *Walter Butler Bldg. Co. v. Soto*, 97 S.E.2d 275 (W. Va. 1957)).

lished that administrative agencies are active players in the division of powers, and, while always subject to properly enacted and valid laws and to constitutional constraints, their actions are entitled to respect from both the legislature and the courts.”<sup>522</sup> In short, to ensure that the separation of powers is not violated, it is “evident that courts will not override administrative agency decisions, of whatever kind, unless the decisions contradict some explicit constitutional provision or right, are the results of a flawed process, or are either fundamentally unfair or arbitrary.”<sup>523</sup>

## 2. Review of Decisions by County Commissions for Appeals

Of course, a county commission is not an administrative agency. Nevertheless, the supreme court’s holding in *American Bituminous* confirms that the same limitations on a circuit court’s scope of review are applicable to appeals to the circuit court from a county commission in *ad valorem* property tax valuation appeals. Before the enactment of SB 401, a taxpayer who believed that the assessed value of his property was excessive had to contest this valuation issue under the provisions of West Virginia Code section 11-3-24, which required taxpayers to apply for relief from a county commission sitting as a board of equalization and review.<sup>524</sup> If a taxpayer did so, under the provisions of section 11-3-25, he or she could then appeal an adverse decision from the board of equalization and review to the circuit court.<sup>525</sup>

In *American Bituminous*, the court considered the standard of review which may be exercised by a circuit court considering a valuation appeal pursuant to section 11-3-25. Recognizing that the section 11-3-25 limits the court

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<sup>522</sup> *Id.* at 787.

<sup>523</sup> *Id.* Among the prior cases cited in *Frymier-Halloran* was *Walter Butler Bldg. Co. v. Soto*, 97 S.E.2d 275 (W. Va. 1957), in which the court also decided that an interpretation of the word “anew” that would allow the circuit court to hear new evidence beyond that heard by the Tax Commissioner would run afoul of article V, section 1 of the Constitution of West Virginia. *Id.* at 279. There, the court held that the Tax Commissioner acts administratively in assessing and fixing the amount of a tax, and likewise when he acts administratively upon the petition of the taxpayer for reassessment of a tax. *Id.* at 278. By contrast, the court held that the legislature intended to authorize the court to review and determine judicial questions such as the validity of the assessment of the tax and the applicability of the section of the statute which imposes the tax upon the activity of the taxpayer and subjects him to liability to pay it, and held that these matters “present essentially judicial questions the determination of which requires the exercise of the judicial function.” *Id.* at 281. An interpretation of the statute that would permit the court to begin anew and fix the amount of a tax would thus invest in the circuit court an administrative function, and thus would violate article V, section 1. *Id.* The court observed that “[a]ny attempt to confer administrative or other nonjudicial power upon the court or to extend the scope of the provision to include any nonjudicial function, which might or could be implied from the language of the provision, is of no force or effect.” *Id.* at 282.

<sup>524</sup> W. Va. Code § 11-3-24.

<sup>525</sup> W. Va. Code § 11-3-25.

to reviewing the record made before the board of equalization and review,<sup>526</sup> the court applied *Frymier-Halloran* and found it controlling, and declared that “judicial review of a decision of a board of equalization and review regarding a challenged tax-assessment valuation is limited to roughly the same scope permitted under the West Virginia Administrative Procedures Act, W. Va. Code ch. 29A.”<sup>527</sup>

Because a county commission is not an administrative agency, Justice Cleckley’s analysis in *Frymier-Halloran* of the constitutional deference due to decisions of an administrative agency cannot fully explain the Court’s decision in *American Bituminous*. Nevertheless, separation of powers principles were clearly implicated in that case, because a county commission is itself a creature of the Constitution of West Virginia. While, as Professor Robert M. Bastress, Jr. has observed, “it is clear that the commissions are to function as their county’s *executive and legislative bodies*, and the Legislature has placed on them a broad range of powers to superintend and administer the counties’ affairs[,]”<sup>528</sup> they are also constitutionally prohibited from exercising judicial functions. Following the ratification of the Judicial Reorganization Amendment of 1974,<sup>529</sup> article IX, section 11 of the Constitution of West Virginia defines the powers of the county commissions as follows: “[s]uch commissions may exercise such other powers, and perform such other duties, *not of a judicial nature*, as may be prescribed by law.”<sup>530</sup> Also, were the legislature to attempt to assign to a county commission a judicial function, that assignment would violate the constitutional provision now found at article VIII, section 1 which provides that “[t]he judicial power of the State shall be vested *solely* in a supreme court of appeals and in the circuit courts, and in such intermediate appellate courts and magistrate courts as shall be hereafter established by the legislature, and in the justices, judges and magistrates of such courts.”<sup>531</sup> Fixing the value of property and the amount of *ad valorem* tax due is an executive or administrative function, not a judicial function, and the result in *American Bituminous* limiting the scope of a circuit

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<sup>526</sup> The court is so limited when “there was an appearance by or on behalf of the owner before the county court, or if actual notice, certified by such court, was given to the owner.” See W. VA. CODE § 11-3-25 (2010).

<sup>527</sup> *In re Tax Assessment Against Am. Bituminous Power Partners*, 539 S.E.2d 757, 762 (W. Va. 2000).

<sup>528</sup> Robert M. Bastress, Jr., *Constitutional Considerations for Local Government Reform in West Virginia*, 108 W. VA. L. REV. 125, 155 (2005).

<sup>529</sup> The Judicial Reorganization Amendment of 1974 renamed the county courts as county commissions and moved the provisions relating to them from Article VIII (the Judicial Article) to Article IX (the County Organization Article).

<sup>530</sup> W. VA. CONST. art. IX, § 11 (emphasis added).

<sup>531</sup> W. VA. CONST. art. VIII, § 1.

court's review of a decision of a board of equalization and review was certainly properly based on the separation of powers principle.<sup>532</sup>

One issue not addressed by the court in *American Bituminous* is the provision then contained in W. Va. Code § 11-3-25 that "[i]f, however, there was no actual notice to such owner, and no appearance by or on behalf of the owner before the county court, or if a question of classification or taxability is presented, the matter shall be heard de novo by the circuit court."<sup>533</sup> A similar provision has been carried forward in SB 401.<sup>534</sup> If fixing the value of property and the amount of *ad valorem* tax due is an executive or administrative function, so too is determining the proper classification for the property and determining whether property is taxable in the first place. Certainly, these are areas in which we would expect the executive branch of government to have extensive experience and expertise. Given the decisions in *American Bituminous* and *Frymier-Halloran*, the statutory provision for de novo review in any appeal of tax issue first adjudicated by a county commission or the Tax Commissioner also violates the separation of powers principle.

### 3. Review of Decisions by County Commissions in Certiorari

County commissions also hear property tax exoneration requests. Since the legislature has not seen fit to provide for appeals from a decision of a county commission by statute, a circuit court can only review the county commission's decision in certiorari.<sup>535</sup> The original property tax exoneration statute (the statute that was at issue *Bayer Corp.*) was enacted in 1911.<sup>536</sup> It is axiomatic that "[w]hen the Legislature enacts laws, it is presumed to be aware of all pertinent

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<sup>532</sup> See, e.g., *Walter Butler Bldg. Co. v. Soto*, 97 S.E.2d 275, 281 (citing *State ex rel. Hallanan v. Rocke*, 113 S.E. 647 (W. Va. 1922)) (The State Tax Commissioner acts administratively in assessing and fixing the amount of a tax.).

<sup>533</sup> W. VA. CODE § 11-3-25.

<sup>534</sup> See W. VA. CODE § 11-3-25(c) (2010).

<sup>535</sup> See *State ex rel. Prosecuting Attorney of Kanawha Cnty. v. Bayer Corp.*, 672 S.E.2d 282, 287 n.7 (W. Va. 2008).

This Court has previously held that '[n]o express remedy having been provided for review of [a Commission's] action [under W. Va. Code § 11-3-27], the circuit court has jurisdiction to review the same by the writ of certiorari.' Syl. pt. 4, *Humphreys v. County Court of Monroe County*, 90 W. Va. 315, 110 S.E. 701 (1922). See also *City of Huntington v. State Water Comm'n*, 135 W. Va. 568, 576-577, 64 S.E.2d 225, 230 (1951) ('Wherever by a dearth in a statute there is given no statutory right of review, the writ of certiorari is available in order to obtain judicial review of the findings of an administrative board.'). Consequently, a challenge to a Commission's decision under W. Va. Code § 11-3-27 may be done through a petition for a writ of certiorari.

*Id.*

<sup>536</sup> Acts 1911, c. 50, § 132a (now codified at W. VA. CODE § 11-3-27 (2010)).

judgments rendered by the judicial branch.”<sup>537</sup> In 1911, the legislature would have been aware of the court’s holdings in *Alderson v. Commissioners* where the court ruled that “[t]he circuit court, where such further proceedings outside the record before it are necessary, cannot retain and try the cause, but must remand to the inferior tribunal for such proceedings.” It would have been aware of the court’s decisions in *Morgan v. Ohio River Railway Co.*, *Michaelson v. Cautley*, and *McClure-Mabie Lumber Co. v. Brooks*, holding that the purpose of the certiorari statutes was to diminish the differences between appeals and proceedings in certiorari. It would have been mindful of the court’s discussion in *Poteet v. Cabell County Commissioners*, of the limitations on the scope of a circuit court’s review of decisions of a county commission imposed by the Constitution’s separation of powers provision. Given that legal context, if the legislature intended for the circuit court’s review of a county commission’s decision in an exoneration case to be de novo, it would have explicitly said so to eliminate any doubt. Even then, there is substantial doubt that such an explicit direction could have survived a substantive analysis of its constitutionality under the separation of powers provision.

By the same logic as *Walter Butler Building Co. v. Soto*, a county commission does not and cannot act in a judicial capacity in hearing a request for exoneration,<sup>538</sup> and it therefore violates the separation of powers principles, reaffirmed in *Frymier-Halloran* and *American Bituminous*, to allow a circuit court to usurp a commission’s administrative authority to decide exoneration requests by reviewing those non-judicial determinations de novo.

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<sup>537</sup> *Kessel v. Monongalia Cnty. Gen. Hosp.*, 648 S.E.2d 366 (W. Va. 2007) (quoting Syl. pt. 2, *Stephen L.H. v. Sherry L.H.*, 465 S.E.2d 841 (W. Va. 1995) (citations omitted)).

<sup>538</sup> Although the syllabus in *Humphreys v. County Court of Monroe County* provides, inter alia, that “[i]n passing upon an application for exoneration from taxes charged against the applicant, . . . a county court acts judicially[.]” that provision was rendered inoperable by the ratification of the Judicial Reorganization Amendment in 1974, limiting the county commission to legislative and executive functions. Moreover, it is apparent that the court’s own analysis has evolved since *Humphreys* was decided. See *Norfolk & W. Ry. Co. v. Bd. of Pub. Works*, 21 S.E.2d 143, 146 (W. Va. 1942) (“We wish to note and correct in passing a statement made in the opinion in the case of *Wheeling Bridge & Terminal Railway Co. v. Paull*, Judge, 39 W.Va. 142, 147, 19 S.E. 551, to the effect that the ascertainment of the value of property is strictly a judicial function. For the purpose of taxation, it is primarily an executive or administrative function with which the courts will not interfere unless shown plainly to have been abused. *Great Northern Ry. Co. v. Weeks*, 297 U.S. 135, 151, 56 S.Ct. 426, 80 L.Ed. 532.”). See also *In re Brandon Lee H.S.*, 629 S.E.2d 783, 791 (W. Va. 2006) (reiterating vitality of separation of powers provisions at county level, and stating that the “separation of powers provision precludes courts from exercising administrative duties relating to executive branch in refusing to use judicial power of mandamus to control fiscal affairs of county court”) (citing *State ex rel. Canterbury v. Cnty. Court*, 158 S.E.2d 151, 156 (W. Va. 1967)).

D. *Shortcomings in the Supreme Court's Analysis in State ex rel. Prosecuting Attorney of Kanawha County v. Bayer Corp.*

Against this backdrop of the court's prior cases on the scope of review in proceedings in certiorari before a circuit court, the shortcomings of the decision in *State ex rel. Prosecuting Attorney of Kanawha County v. Bayer Corp.* can be demonstrated. There, the court ruled that in proceedings in certiorari, the standard of review by a circuit court in a writ of certiorari proceeding is de novo.<sup>539</sup> This decision was not based on the 1996 decision in *Lipscomb*, (which the Court didn't mention) but relied primarily on *Harrison v. Ginsberg*, decided in 1982:

Bayer contends that the circuit court's review should have been limited to "arbitrary and capricious." We disagree for the reasons stated in *Harrison*:

There is language in some relatively recent opinions of this Court indicating that if an inferior tribunal's decision is arbitrary and capricious it should not be affirmed by the circuit court on certiorari. While we agree that an arbitrary and capricious decision of an inferior tribunal should not be affirmed by the circuit court on certiorari, in light of the language of W. Va. § 53-3-3 these cases cannot be read as limiting the circuit court on certiorari to an arbitrary and capricious standard of review. Such a result would be inconsistent with our [recognition] that in proper circumstances, the circuit court on certiorari is authorized to take evidence independent of that contained in the record of the lower tribunal.

Moreover, we recently held in . . . a case involving review by the circuit court on certiorari of a county board of education administrative ruling, that [w]hen the circuit court sits in review of the decisions of . . . administrative tribunals it shall record findings of fact and conclusions of law along with the judicial orders which it issues. It is obvious that the circuit court could not comply with this requirement without making its own independent review of the law and facts pertinent to the case.

. . . . Since the circuit court in this case limited its review to an arbitrary and capricious standard, its decision affirming the appellant's denial of AFDC benefits is erroneous.

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<sup>539</sup> Syl. pt. 2, *Bayer Corp.*, 672 S.E.2d at 282.

*Harrison*, 169 W.Va. at 175-176, 286 S.E.2d at 283-284 (internal citations and quotations omitted). For the reasons set out in *Harrison*, we also reject other standards of review suggested by Bayer.<sup>540</sup>

The decision in *Harrison*, however, was based on an overly broad interpretation of the “proper circumstances” under which a circuit court is permitted to hear new evidence beyond that included in the record from the proceeding before the inferior tribunal.

### 1. Exceptions to the Rule That No New Evidence Is Permitted

*Harrison* relied heavily on *North v. West Virginia Board of Regents*,<sup>541</sup> in which the supreme court decided that a student is entitled to substantial due process protection in disciplinary hearings that could result in the student's expulsion from school. Because the circuit court rejected an application for a writ of certiorari, the record before the West Virginia Supreme Court did not reflect what transpired at the various hearings held at West Virginia University.<sup>542</sup> After deciding that the student was entitled to substantial due process protection and that the petition for a writ of certiorari did state a valid claim for relief, the court addressed the extent of the hearing that should be afforded under the writ of certiorari by the circuit court.<sup>543</sup>

The court reviewed the effect of the enactment of West Virginia Code sections 53-3-2 and 53-3-3 in 1882, and concluded that the statutes broadened the scope of the writ of certiorari in the sense of the type of inferior tribunals from which certiorari would lie, so that afterwards “actions taken by inferior tribunals acting in a judicial or quasi-judicial capacity, where no common law or statutory appeal rights were permitted, became reviewable by certiorari.”<sup>544</sup> It further concluded that the statutes also broadened the extent of review afforded under the writ, so that “the court may review the action of the lower tribunal to determine if it acted in an arbitrary and capricious manner.”<sup>545</sup>

In *North*, the court characterized *Beverlin* as “one more progression in the line of cases expanding the statutory writ of certiorari.”<sup>546</sup> It also included *McClure-Mabie Lumber Co. v. Brooks* in this category of cases, observing that in that case, “[t]o correct an untruthful return, evidence outside the record must

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<sup>540</sup> *Id.* at 290 n.12.

<sup>541</sup> 233 S.E.2d 411 (W. Va. 1977).

<sup>542</sup> *Id.* at 413.

<sup>543</sup> *Id.* at 417-18.

<sup>544</sup> *Id.* at 418.

<sup>545</sup> *Id.* at 419 (citing *Beverlin v. Bd. of Educ. of Lewis Cnty.*, 216 S.E.2d 554 (W. Va. 1975)).

<sup>546</sup> *Id.*



be obtained.”<sup>547</sup> Ignoring the explicit reservation in *McClure-Mabie* that the court there refused to “say [the statute] allows new pleadings or evidence,” and ignoring any possible distinction between evidence as to the correctness of a return of service and evidence on the merits of the case, and on the basis only of its reading of *Beverlin* and *McClure-Mabie*, the court in *North* concluded that

on certiorari where, as here, substantial rights are alleged to have been violated by the inferior tribunal, the circuit court is authorized to take evidence independent of that contained in the record of the lower tribunal to determine if such violations have occurred. To hold otherwise is to frustrate the clear statutory mandate that the certiorari review satisfy the requirements of law and justice.<sup>548</sup>

Syllabus point 4 in *North* provides:

A writ of certiorari will lie from an inferior tribunal, acting in a judicial or quasi-judicial capacity, where substantial rights are alleged to have been violated and where there is no other statutory right of review given. Upon the hearing of such writ of certiorari, the circuit court is authorized to take evidence, independent of that contained in the record of the lower tribunal, to determine if such violations have occurred.<sup>549</sup>

The court was quick, however, to observe in *North* that the separation of powers principle still limited the scope of review:

In arriving at this conclusion, we are mindful that the concept of an “inferior tribunal” under the certiorari statute, W.Va.Code, 53-3-3, may involve a tribunal which, besides exercising quasi-judicial powers, also operates in administrative areas. Our holding is consistent with prior decisions of this Court as to the scope of judicial review on matters arising out of administrative agencies which exercise quasi-judicial functions.<sup>550</sup>

The court also reaffirmed that the scope of review is “also consistent with the extent of review afforded in contested cases under W.Va.Code, 29A-5-4(f) of the Administrative Procedures Act[,]” which limits appeals to being held “without a jury and shall be upon the record made before the agency” and noted

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<sup>547</sup> *North v. W. Va. Bd. of Regents*, 233 S.E.2d 411, 419 (W. Va. 1977).

<sup>548</sup> *Id.*

<sup>549</sup> *Id.* at Syl. pt. 4; *accord* *Adkins v. Gatson*, 624 S.E.2d 769, 773 (W. Va. 2005).

<sup>550</sup> *North*, 233 S.E.2d at 419 n.11 (citing *State v. Huber*, 40 S.E.2d 11 (W. Va. 1946)); *United Fuel Gas Co. v. Pub. Serv. Comm’n*, 80 S.E. 931 (W. Va. 1914).

that “[n]or do we by our holding intend to overrule those decisions that require the exhaustion of administrative remedies before access to the courts may be obtained.”<sup>551</sup> The court then remanded the matter to the circuit court with instructions to “hold such evidentiary hearing as is necessary to determine petitioner North’s claim of *due process violations*.”<sup>552</sup>

The result in *North* seems to be predicated on two constitutional guarantees: the guarantee of substantial procedural due process rights in hearings before the inferior tribunal under the state and federal constitution, and the guarantee of the right to access to the courts for remedy to insure that those rights were, in fact, accorded.<sup>553</sup> It was perhaps not strictly necessary for the court to have interpreted the certiorari statutes themselves as *permitting* the circuit court to hear evidence of whether Mr. North’s procedural due process rights were violated, so much as it was to hold that those statutes could not *prohibit* Mr. North from having his day in court for a hearing on his due process issues.

In any event, the court in *North* specifically confirmed its long standing interpretation that the scope of review in certiorari is similar to that in appeals under the APA. West Virginia Code section 29A-5-4(f) (2010) spells out a similar exception to the rule that the review by the circuit court be limited to the record: “[t]he review shall be conducted by the court without a jury and shall be upon the record made before the agency, *except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken before the court.*” Under the new Rules Governing Administrative Appeals, the circuit court is limited to considering “evidence which was made part of the record in the proceeding before the administrative agency, ‘unless there are alleged irregularities in the procedure before the agency, not shown on the record.’”<sup>554</sup> If, however, the record made before the inferior tribunal is sufficient to permit a review of whether sufficient procedural due process protections have been afforded (as it was in *Beverlin*), then the deferential scope of review must be utilized by the circuit court.

## 2. In *Harrison*, the Supreme Court Misconstrued *North*

In *Harrison v. Gibson*, the court again reviewed the genesis of the remedy afforded by the writ of certiorari. The court cited *Long v. Ohio River R.*

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<sup>551</sup> *Id.* (citing *Bank of Wheeling v. Morris Plan Bank & Tr. Co.*, 184 S.E.2d 692 (W. Va. 1971)).

<sup>552</sup> *Id.* (emphasis added).

<sup>553</sup> U. S. CONST. amend. XIV; W. VA. CONST. art. III, §§ 10, 17.

<sup>554</sup> W. Va. R. P. Admin. Ap. 6(a). These rules “govern the procedures in all circuit courts for judicial review of final orders or decisions from an agency in contested cases that are governed by the Administrative Procedures Act, W. Va. Code § 29A-5 et. seq.” but “do not apply to extraordinary remedies such as certiorari which are governed by Rule 71B(a) of the West Virginia Rules of Civil Procedure.” See Rule 1(a). Rule 6(c) further provides that “[i]n the event a party alleges irregularities in the procedure before the agency, the circuit court may hold a hearing and consider other testimony and evidence *solely on that issue.*” (emphasis added).

*Co.*<sup>555</sup> and *Harbert v. Monongahela River R. Co.* for the proposition that the statutes authorized the circuit court to rehear the issues on the evidence certified from the inferior tribunal.<sup>556</sup> It cited *Humphreys*, for the propositions that the circuit court could “hear and determine the matter in controversy, upon the record made in the county court, and enter such judgment as the county court should have entered”<sup>557</sup> and “the circuit court shall enter such judgment as the inferior court should have entered, not only in consideration of questions of law but of fact as well.”<sup>558</sup> It cited *Snodgrass v. Board of Education*,<sup>559</sup> in which case the court held that the scope of the review “makes the circuit court, to all intents and purposes, a fact finding tribunal upon the record as it was before the inferior court.”<sup>560</sup> None of these cases speaks to the issue of whether new evidence can be taken or whether deference is due to the findings and conclusions of the inferior tribunal.

In *Harrison*, the court characterized the scope of review under an arbitrary and capricious standard as “a narrow one, the issues being limited to whether the agency decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment,” and observed that “[a]lthough the ‘arbitrary and capricious’ standard requires a searching and careful inquiry into the facts, the ultimate scope of review is narrow, and the reviewing court is not empowered to substitute its judgment for that of the agency.”<sup>561</sup> While it recognized that “[t]here is language in some relatively recent opinions of this Court indicating that if an inferior tribunal’s decision is arbitrary and capricious it should not be affirmed by the circuit court on certiorari,”<sup>562</sup> the court nevertheless concluded that “[t]he role of the circuit court on certiorari as a fact finding tribunal, with the power to enter judgment as law and justice may require, is inconsistent with the arbitrary and capricious standard of review,” holding that “[s]uch a result would be inconsistent with our holding in *North* that in proper circumstances, the circuit court on certiorari is authorized to take evidence independent of that contained in the record of the lower tribunal.”<sup>563</sup>

The conclusion in *Harrison* that the arbitrary and capricious standard is inappropriate was unwarranted. The court essentially ignored the fact that the “proper circumstances” that the Court was referring to in *North* were limited to

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<sup>555</sup> 13 S.E. 1010 (W. Va. 1891).

<sup>556</sup> *Harrison v. Ginsberg*, 286 S.E.2d 276, 282 (W. Va. 1982).

<sup>557</sup> *Id.* (quoting Syl. pt. 5, *Humphreys v. Cnty. Ct. of Monroe Cnty.*, 110 S.E. 701 (W. Va. 1922)).

<sup>558</sup> *Id.* at 283 (quoting *Snodgrass v. Bd. of Educ.*, 171 S.E. 742, 742–43 (W. Va. 1933) (citing *Humphreys*, 110 S.E. at 701)).

<sup>559</sup> 171 S.E. 742 (W. Va. 1933).

<sup>560</sup> *Harrison*, 286 S.E.2d at 283 (quoting *Snodgrass*, 171 S.E. at 742–43)).

<sup>561</sup> *Id.*

<sup>562</sup> *Id.*

<sup>563</sup> *Id.*

situations in which “where substantial rights are alleged to have been violated” and where the record from the inferior tribunal is insufficient to permit a determination of whether violations occurred. Nothing in *North* can be read to permit the circuit court to hear new evidence on the merits of whether the student should have been dismissed. Also missing from the decision in *Harrison* is any recognition that in *North*, the court explicitly recognized that the separation of powers principle limits the scope of review under certiorari. Finally, there is no mention in *Harrison* of the court’s observation in *North* that the scope of review is consistent with the extent of review afforded in contested cases under the APA, or that the introduction of new evidence is contemplated by the APA under the same circumstances as permitted under *North*, i.e., “in cases of alleged irregularities in procedure before the agency.”

In *Harrison*, the court also indicated that the arbitrary and capricious standard of review would be inconsistent with its holding in *Golden v. Board of Education of the County of Harrison, West Virginia*<sup>564</sup> that a circuit court must include findings of fact and conclusions of law in its order when it reviews the decisions of administrative tribunals in proceedings in certiorari, stating that “[i]t is obvious that the circuit court could not comply with this requirement without making its own independent review of the law and facts pertinent to the case.”<sup>565</sup> However, even if the circuit court is required to defer to the inferior tribunal’s findings and conclusions and can only reverse if it found that the inferior tribunal’s decision was arbitrary and capricious, the circuit court could still be required to state the facts and reasoning upon which its decision is based. *Golden* by no means compels the conclusion that no deference is due the findings and conclusions of the lower court.

In *Harrison*, the court didn’t explain why any of its previous cases stating that the purpose of the certiorari statutes was to diminish or eliminate the differences between the writs of error and appeal and the writ of certiorari weren’t applicable, nor did it discuss, much less overrule, any of its prior cases. holding that that de novo review is not permitted. Nor did the court explain why separation of powers issues were not implicated, given that the case arose from a determination of an administrative agency as opposed to a lower court in the judicial branch. Finally, since in cases decided after *Harrison* such as *Jefferson Utilities*, *Corliss*, and *Far Away Farm*, the court reached the opposite conclusion and ruled that *de novo* review in certiorari was not appropriate without mentioning *Harrison*, it seems clear that *Harrison*, not *Alderson*, was the more likely candidate to have been overruled in *Bayer Corp.*

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<sup>564</sup> 285 S.E.2d 665 (W. Va. 1981).

<sup>565</sup> *Harrison*, 286 S.E.2d at 283.

### 3. The Supreme Court Abandoned All of *North's* Limitations

In *Bayer Corp.*, after starting out with only a partial definition of the term “de novo,” (see *supra*, and after quoting a portion of its discussion on of the history of West Virginia Code section 53-3-3 in *Harrison*, the court then cited *Long v. Ohio River Railway Co.* for the proposition that

[t]he principal use of this writ with us before 1868 was to bring up records, in whole or in part, in aid of some other proceeding; but the statute of 1882...has very much enlarged its scope, giving power to rehear after judgment on the evidence certified, as well as correct errors in law, and in a proper case to retain for trial de novo[.]<sup>566</sup>

By omitting important language from the end of the quote (in this instance, the phrase “being thus in effect an appeal from the judgment of a justice in a certain class of cases”<sup>567</sup>), the court overlooked the fact that the 1889 amendment to the statute (and the constitution) permitted *only* cases that arose from a justice (that is, cases that arose from the judicial branch) to be tried anew in the circuit court.

The court also noted that “[w]e have also observed, in passing, that ‘under the expanded role accorded certiorari by West Virginia Code § 53-3-3, the circuit court, in effect, takes the matter de novo.’”<sup>568</sup> Here, the court relies on mere dicta. There was no fact-finding at issue in *MacQueen*. To the contrary, the case involved a petition for prohibition presenting a pure legal issue: in which county venue in a certiorari proceeding was proper. *MacQueen* simply does not speak to the issue whether a circuit court is obligated to engage in de novo review on certiorari review from the decision of a county commission. It would have been perhaps more understandable for the court to have cited *Lipscomb v. Tucker County Commission*, but the court did not do so.

In fact, the court’s entire holding on the standard of review in *Bayer Corp.* depends on an incomplete reading of *North*: “[w]e have also indicated that ‘[u]pon the hearing of [a] writ of certiorari, the circuit court is authorized to take evidence, independent of that contained in the record of the lower tribunal[.]’”<sup>569</sup> The court explicitly stated that its holding that de novo review was appropriate was “based upon the fact that a circuit court is permitted to consider evidence that was not submitted to a lower tribunal . . . [t]he circuit court was permitted to consider this evidence only because W. Va.Code § 53-3-3 has been

<sup>566</sup> *State ex rel. Prosecuting Attorney of Kanawha Cnty. v. Bayer Corp.*, 672 S.E.2d 282, 289 n.11 (W. Va. 2008) (quoting *Long v. Ohio River R. Co.*, 13 S.E. 1010, 1011 (W. Va. 1891)).

<sup>567</sup> *Long*, 13 S.E. at 1011 (emphasis added).

<sup>568</sup> *Bayer Corp.*, 672 S.E.2d at 290 (citing *Bd. of Ed., Lincoln Cnty. v. MacQueen*, 325 S.E.2d 355, 357 (W. Va. 1984)).

<sup>569</sup> *Id.* at 290 (quoting *Syl. pt. 4, North v. W. Va. Bd. of Regents*, 233 S.E.2d 411, 413 (W. Va. 1977)).

construed as authorizing the submission and consideration of such evidence.”<sup>570</sup> While in *Harrison*, the court at least paid lip service to the fact that the circuit court’s authority to hear new evidence was limited to the “proper circumstances;”<sup>571</sup> here, the court unabashedly left out critically important limitations in the syllabus point in *North* limiting the introduction of new evidence to situations where “substantial rights are alleged to have been violated”<sup>572</sup> and limiting the new evidence to that required to permit the circuit court to decide “if such violations have occurred.”<sup>573</sup>

The court also attempted to justify its position in *State ex rel. Prosecuting Attorney of Kanawha County v. Bayer Corp.* by observing the “the record reveals that Bayer attached to its pre-and post-reversal memoranda of law exhibits and affidavits that were not submitted into the record before the Commission.”<sup>574</sup> It noted that “Bayer attached two exhibits to its pre-reversal memorandum of law, and two affidavits to its post-reversal memorandum of law.”<sup>575</sup> While those statements are strictly true, they don’t provide any justification for the court’s decision, because the circuit court explicitly stated that it relied only on the record made in the hearing before the county commission.<sup>576</sup> Moreover, the exhibits appended to Bayer’s original Memorandum of Law in the circuit court were directed to peripheral matters, and neither of these matters was referenced, even obliquely, in the court’s Final Order Granting Writ of Certiorari and Denying Respondent Relief.<sup>577</sup> Finally, the circuit court explicitly declined to consider either of the two affidavits, one of which was filed with Bayer’s Motion for New Trial, and the other filed a couple of days later.<sup>578</sup>

In fact, the West Virginia Supreme Court was fully aware of the fact that none of the new evidence offered by Bayer had been considered by the circuit court, because it also declared that “[e]ven if the circuit did not rely on the exhibits and affidavits in rendering its decision, this would not alter the fact that

<sup>570</sup> *State ex rel. Prosecuting Attorney of Kanawha Cnty. v. Bayer Corp.*, 672 S.E.2d 282, 290–91 (W. Va. 2008).

<sup>571</sup> *Harrison v. Ginsberg*, 286 S.E.2d 276, 283 (W. Va. 1982).

<sup>572</sup> Syl. pt. 4, *North v. W. Va. Bd. of Regents*, 233 S.E.2d 411, 413 (W. Va. 1977)

<sup>573</sup> *Id.* The court in *Bayer Corp.* also cited *Adkins v. Gatson*, 624 S.E.2d 769 (W. Va. 2005), which contains the same abbreviated quote from *North* in a discussion of the scope of review in certiorari in circuit court. In *Adkins*, however, that language is mere dicta because the court ruled that the circuit court in that case could not hear the case in certiorari since a mechanism for an appeal was provided by statute.

<sup>574</sup> *Bayer Corp.*, 672 S.E.2d 291.

<sup>575</sup> *Id.* at 291 n.15.

<sup>576</sup> *See id.*, Final Order at 7 (“The Commission held a hearing on Bayer’s petition which produced the evidence and testimony upon which this Court relies.”).

<sup>577</sup> Both of the exhibits were letters, one of which (from the Attorney General’s office) arguably could have been considered by the court as a proper subject for judicial notice under Rule 201 of the Rules of Evidence. The other was directed to a matter raised by the prosecuting attorney that was not addressed by either the circuit court or the West Virginia Supreme Court.

<sup>578</sup> *See* Order Den. Bayer’s Rule 59(a) and 59(e) Mots. at 4.

such evidence was presented and could have been considered.”<sup>579</sup> Of course, cases should be decided on the basis of what *is* in the record before it, not on the basis of what *could have been* in the record, and on the basis of a complete reading and understanding of the prior cases law. Neither was present in *Bayer Corp.*

#### 4. The Supreme Court Ignored Bayer’s Separation of Powers Argument

Having already arrived at its conclusion, the court gave short shrift to Bayer’s contention that a *de novo* review is proscribed by the separation of powers principle. In a footnote, the court recognized that Bayer made that argument, and conceded that, in *Danielley v. City of Princeton*, and *Frymier-Halloran v. Paige*, it had ruled that a circuit court could not exercise executive functions. It even went so far as to recognize that in *American Bituminous*, it held that a circuit court can only review a county commission’s tax valuation ruling based upon the record created at the county commission hearing, not *de novo*. However, it attributed that limitation in *American Bituminous* to be a statutory limitation found at West Virginia Code section 11-3-25, not a constitutional limitation,<sup>580</sup> but that doesn’t explain this language in *American Bituminous*:

[a]s this Court’s previous cases suggest, *and as we have recognized in other contexts involving taxation, e.g., Frymier-Halloran v. Paige*, judicial review of a decision of a board of equalization and review regarding a challenged tax-assessment valuation is limited to roughly the same scope permitted under the West Virginia Administrative Procedures Act, W. Va.Code ch. 29A.<sup>581</sup>

Ignoring the fact that a county commission is constitutionally prohibited from exercising judicial functions, and the attendant conclusion that, in reviewing a decision on a request for exoneration from a county commission, a circuit court is reviewing a decision from a different branch of government, the court brushed aside this issue, ruling that “the cases cited by Bayer were fact specific and therefore distinguishable from the nature of the issues presented in this case” without identifying what those facts were or how they affected its analysis.<sup>582</sup>

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<sup>579</sup> *Bayer Corp.*, 672 S.E.2d at 291 n.16.

<sup>580</sup> *Id.* at 291 n.17.

<sup>581</sup> *In re Tax Assessment Against Am. Bituminous Power Partners*, 539 S.E.2d 757, 762 (W. Va. 2000) (emphasis added) (citations omitted).

<sup>582</sup> *Bayer Corp.*, 672 S.E.2d at 291 n.17.

### 5. The Supreme Court Didn't Explain Why Different Standards of Review Should Apply

The legislature designated county commissions as the first level adjudicatory bodies responsible for hearing and deciding exoneration requests. It also designated county commissions as the first level adjudicatory bodies responsible for hearing and deciding valuation disputes between taxpayers and the taxing authority. In the later situation, the legislature by statute provided for an appeal to a circuit court on the record made before the county commission. In *American Bituminous*, the court confirmed that the scope of review in the circuit court was limited to one similar to that in an appeal contemplated by the APA, that is, the county commission's decision can't be reversed unless it was not supported by substantial evidence; was in contravention of any regulation, statute, or constitutional provision; was clearly wrong; or was arbitrary, capricious, or characterized by abuse of discretion.<sup>583</sup>

Certainly, if the scope of judicial review in a valuation appeal is constitutionally limited as in *American Bituminous*, so too should be the scope of review in a review of an exoneration decision. The decision under review in *Bayer Corp.* was made by the same people that decide valuation disputes, wearing their county commission hats as opposed to their board of equalization and review hats. As in *Corliss*, the county commission conducted "a comprehensive and seemingly thorough public review" as to the nature of the errors that led to Bayer's overpayment of taxes. The county commission decided that it had enough justification to find that Bayer satisfied both of the statutory criteria, cut off the presentation of evidence, and voted to grant the taxpayer's request.

Unlike in *North* where it was necessary for the circuit court to act as a fact-finder in the first instance, there was no claim in the circuit court by the Assessor that she was denied procedural due process before the commission, nor by the county commission that it denied procedural due process to itself. The circuit court's review should therefore have been limited to the record made at the hearing before the county commission, and should have unfolded in the same deferential manner as this court outlined in *Adkins v. Department of Education*. The county commission made findings of fact in this case based on the extensive evidence submitted, including the commission's assessment and weighing of live testimony, and the circuit court should not have been permitted to substitute its assessment of the facts and application of the statutory standards it administers in section 11-3-27 and to make its own credibility determinations when it lacked access to live witness testimony of the sort considered by the county commission.<sup>584</sup>

<sup>583</sup> *In re Tax Assessment Against Am. Bituminous Power Partners*, 539 S.E.2d 757, 761 (W. Va. 2000).

<sup>584</sup> See *Webb v. W. Va. Bd. of Med.*, 569 S.E.2d 225, 232 (W. Va. 2002) ("[C]redibility determinations by the finder of fact in an administrative proceeding are 'binding unless patently without basis in the record.'") (quoting *Martin v. Randolph Cnty. Bd. of Educ.*, 465 S.E.2d 399, 406



There is also a practical reason why a circuit court should not have the authority to review the cold record and decide that the evidence was insufficient to show that a taxpayer is entitled to relief. In Bayer's case, the county commission cut off the presentation of evidence because the hour was late and it felt that it had heard enough after three hours to permit it to reach a conclusion. Since the circuit court is constitutionally prohibited from hearing new evidence and substituting its judgment for that of the county commission, it should either have ruled that there was sufficient evidence presented to support the county commission's ruling in favor of the taxpayer, or should have remanded the matter to the county commission for a new hearing, at which the taxpayer would have the opportunity to present any evidence that it was not allowed to present in the original hearing.

Because the legislature designated county commissions as the appropriate body to decide exoneration requests, it was simply not proper for the Circuit Court of Kanawha County to usurp that role.<sup>585</sup> By giving no deference to the decision of the county commission made in its executive or administrative capacity and in substituting its own decision for that of the county commission, the circuit court undertook to perform a function that the legislature directed the county commission to perform, in violation of article IX, section 9 of the West Virginia Constitution. In this case, the circuit court sat as an appellate court reviewing the factfinding of the commission. As such, the West Virginia Supreme Court's well-established precedents require that a circuit court review the lower tribunal's factfinding for clear error.<sup>586</sup> Accordingly, the circuit court's decision to apply a de novo standard of review should have been reversed. Because there was no basis upon which to hold that the commission's findings were arbitrary and capricious, the commission's order should have been reinstated. But that's not what happened. Instead, the supreme court misread its own prior decisions and overlooked the increase in workload for the circuit courts resulting from the required de novo review in certiorari proceedings and established a markedly different standard of review for proceedings in certiorari than for an appeal to which the APA applies.

True, the court did limit the types of proceedings in certiorari that are now suddenly subject to de novo review. Syllabus point 2 of *Bayer Corp.* provides that "[u]nless otherwise provided by law, the standard of review by a cir-

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(W. Va. 1995)); *Michael D.C. v. Wanda L.C.*, 497 S.E.2d 531, 538 (W. Va. 1997) ("A reviewing court cannot assess witness credibility through a record."); *Gum v. Dudley*, 505 S.E.2d 391, 398 (W. Va. 1997) ("A reviewing court cannot assess witness credibility through a record.").

<sup>585</sup> See *Corliss v. Jefferson Cnty. Bd. of Zoning Appeals*, 591 S.E.2d 93, 102 (W. Va. 2003) ("Just as the circuit court completely sidestepped the Board's decision as to adequacy, the court similarly ignored the expertise the administrative entities involved in this case have developed with regard to land measurement and its consequent obligation to accord such expertise/judgment a significant level of deference barring any clear error.").

<sup>586</sup> See, e.g., *Morgan v. Ohio River R. Co.*, 19 S.E. 588, 589-90 (W. Va. 1894) (explaining that certiorari "is an appellate writ"); *Corliss*, 591 S.E.2d at 97-98 (reviewing fact-finder for clear error on certiorari).

cuit court in a writ of certiorari proceeding under W. Va. Code § 53-3-3 (1923) (Repl.Vol.2000) is *de novo*.”<sup>587</sup> The court explained that

[o]ur holding is qualified because there are statutes which authorize review by a petition for a writ of certiorari, but expressly prohibit *de novo* review. See, e.g., W. Va.Code § 8A-9-6(b)(2004) (Repl.Vol.2007) (“If it appears to the court or judge that testimony is necessary for the proper disposition of the matter, the court or judge may take evidence to supplement the evidence and facts disclosed by the petition and return to the writ of certiorari, but no such review shall be by trial *de novo*.”)<sup>588</sup>

Note, however, that either section 8A-9-6 or its precursor, section 8-24-64, was in force when *Wolfe*, *Jefferson Utilities*, *Corliss*, *Maplewood Estates*, and *Far Away Farm* were decided. However, that statute was never used as the basis for the limited standard of review in any of those cases. Rather, they were based more on separation of powers considerations such as respect for the expertise of the administrative bodies charged with specific responsibilities by the legislature. In fact, only two cases (*Jefferson Utilities* and *Maplewood Estates*) even cite either of these statutes. In *Jefferson Utilities*, the court was discussing whether a board of zoning appeals owes deference to a zoning administrator; the statute isn't directly applicable to that issue because it deals instead with the standard of review in circuit court of a decision of a board of zoning appeals.<sup>589</sup> And in *Maplewood Estates*, the court cited W.Va. Code § 8A-9-6(c) which provides that “[i]n passing upon the legality of the decision or order of the planning commission, board of subdivision and land development appeals, or board of zoning appeals, the court or judge may reverse, affirm or modify, in whole or in part, the decision or order,”<sup>590</sup> but did not cite section 8A-9-6(b) (which prohibits *de novo* review); rather, as did the other cases, it cites syllabus point 5 of *Wolfe* for the standard of review (“[w]hile on appeal there is a presumption that a board of zoning appeals acted correctly, a reviewing court should reverse the administrative decision where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction”).<sup>591</sup>

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<sup>587</sup> See Syl. pt. 2, *Bayer Corp.*, 672 S.E.2d 285.

<sup>588</sup> *Id.* at 290 n.14.

<sup>589</sup> See *Jefferson Utils., Inc. v. Jefferson Cnty. Bd. of Zoning Appeals*, 624 S.E.2d 873, 885 (W. Va. 2005) (finding that “there is no basis for concluding that this review process mandates that the Board is required to start from scratch in conducting its review of a matter before it. Cf. W. Va. Code § 8-24-64 (1969) (Repl.Vol.2003) (expressly providing that circuit court's review of appealed zoning matters shall not ‘be by trial *de novo*’))” (emphasis added).

<sup>590</sup> *Maplewood Estates Homeowners Ass'n v. Putnam Cnty. Planning Co.*, 629 S.E.2d 778, 781–82 (W. Va. 2006).

<sup>591</sup> *Id.* at 782 (quoting Syl. pt. 5, *Wolfe v. Forbes*, 217 S.E.2d 899 (W. Va. 1975)).

While the court in *State ex rel. Prosecuting Attorney of Kanawha County v. Bayer Corp.* decided that the de novo standard of review is applicable when circuit courts reviews decisions of an inferior tribunal in certiorari unless the Legislature specifically prohibits it, that rule is clearly a new rule resting on an entirely new foundation. The court did not, however, expressly overrule any of its prior case law, nor did it explain why the circuit court must defer to an administrative agency's decision and is precluded from hearing new evidence on the merits of the claim when the legislature specifically provides for an appeal to circuit court, but can conduct a de novo review if the legislature fails to explicitly add the magic words providing for an appeal to circuit court. Nor did the court attempt to discern any reason why the legislature might provide for review by the circuit court in certiorari, but in some cases would expressly preclude de novo review, while permitting (by omission) de novo review in others. In light of the history of the court's interpretation of the purpose of the certiorari statutes as being intended by the legislature to afford a litigant the same opportunity for relief as an appeal provided by statute, the result in *Bayer Corp.* simply makes no sense. In *North*, the court characterized *Beverlin* as "one more progression in the line of cases expanding the statutory writ of certiorari"; here, it would be accurate to say that *Bayer Corp.* is one more progression in the line of cases (beginning with *Harrison*) misconstruing *North*.

*E. Cases Decided After State ex rel. Prosecuting Attorney of Kanawha County v. Bayer Corp.*

In *Wysong ex rel. Ramsey v. Walker*,<sup>592</sup> the West Virginia Supreme Court reaffirmed the standard of review announced in *Bayer Corp.* when a circuit court reviews as administrative decision, this one by the Board of Review of the West Virginia Department of Health and Human Resources:

This Court has recognized that "[o]n certiorari the circuit court is required to make an independent review of both law and fact in order to render judgment as law and justice may require." Syllabus Point 3, *Harrison v. Ginsberg*, 169 W.Va. 162, 286 S.E.2d 276 (1982). In other words, "unless otherwise provided by law, the standard of review by a circuit court in a writ of certiorari proceeding under W. Va.Code § 53-3-3 (1923) (Repl. Vol. 2000) is *de novo*." Syllabus Point 2, [*State ex rel. Prosecuting Attorney of Kanawha County v. Bayer*, *supra*. Therefore, the circuit court was not required to give deference to the decision of the hearing officer. See *West Virginia Div. of Envtl. Prot. v. Kingwood Coal Co.*, 200 W.Va. 734, 745, 490 S.E.2d 823, 834 (1997), quoting *Fall River County v. S.D. Dept. of*

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<sup>592</sup> 686 S.E.2d 219 (W. Va. 2009) (per curiam).

Rev., 552 N.W.2d 620, 624 (S.D.1996) (“*De novo* refers to a plenary form of review that affords no deference to the previous decisionmaker.”).<sup>593</sup>

Subsequently, in *Jefferson Orchards, Inc. v. Jefferson County Zoning Bd. of Appeals*,<sup>594</sup> one would have expected the court to again apply the new rule from *Bayer Corp.* Since this case is yet another in the long line of cases concerning zoning in Jefferson County, and since the court in *Bayer Corp.* recognized that the applicable zoning statute precludes de novo review, this case was the perfect case to integrate the decision in *Bayer Corp.* with the court’s prior cases mandating a limited standard of review in zoning cases.

The court quoted the applicable statute:

In the context of land use planning and zoning, circuit court jurisdiction in certiorari to review the decisions and orders of various local entities is described in *W.Va.Code*, 8A-9-1 (2004), *et seq.* Relevant to the circumstances herein is *W.Va.Code*, 8A-9-6 (2004), which states:

(a) The Court or judge may consider and determine the sufficiency of the allegations of illegality contained in the petition without further pleadings and may make a determination and render a judgment with reference to the legality of the decision or order of the planning commission, board of subdivision and land development appeals, or board of zoning appeals on the facts set out in the petition and return to the writ of certiorari.

(b) If it appears to the court or judge that testimony is necessary for the proper disposition of the matter, the court or judge may take evidence to supplement the evidence and facts disclosed by the petition and return to the writ of certiorari, but no such review shall be by trial de novo.

(c) In passing upon the legality of the decision or order of the planning commission, board of subdivision and land development appeals, or board of zoning appeals, the court or judge may reverse, affirm or modify, in whole or in part, the decision or order.<sup>595</sup>

Instead of citing its new rule from *Bayer Corp.*, however, the court the cited several of its previous zoning cases:

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<sup>593</sup> *Id.* at 223–24.

<sup>594</sup> 693 S.E.2d 781 (W. Va. 2010).

<sup>595</sup> *Id.* at 786.

*See, Maplewood Estates Homeowners Assoc. v. Putnam County Planning Commission*, 218 W.Va. 719, 629 S.E.2d 778 (2006) (applying an abuse of discretion standard in the context of *W.Va. Code*, 8A-9-6 (2004)); *Jefferson Utilities, Inc. v. Jefferson County Board of Zoning Appeals*, 218 W.Va. 436, 448, 624 S.E.2d 873, 885 (2005) (A circuit court's review of a zoning matter shall not be by trial *de novo*.).

In syllabus point 5 of *Wolfe v. Forbes*, 159 W.Va. 34, 217 S.E.2d 899 (1975), this Court held: "While on appeal there is a presumption that a board of zoning appeals acted correctly, a reviewing court should reverse the administrative decision where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction." Syl. pt. 1, *Jefferson Utilities, Inc., supra*; syl. pt. 1, *Corliss v. Jefferson County Board of Zoning Appeals*, 214 W.Va. 535, 591 S.E.2d 93 (2003).<sup>596</sup>

And, in fact, syllabus point 3 in *Jefferson Orchards* again relies on *Wolfe*:

While on appeal there is a presumption that a board of zoning appeals acted correctly, a reviewing court should reverse the administrative decision where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction."<sup>597</sup>

Confusingly, however, the court also cited *Wysong* and *Harrison* in its discussion of the standard of review before the circuit court:

Pursuant to W.Va. Const. art. VIII, § 6, circuit courts shall have original and general jurisdiction of proceedings in certiorari and such other jurisdiction as may be prescribed by law. *See, W.Va. Code*, 53-3-1 (1923), *et seq.* (confirming circuit court jurisdiction in certiorari proceedings). With regard to circuit court jurisdiction in certiorari as a reviewing tribunal, syllabus point 3 of *Harrison v. Ginsberg*, 169 W.Va. 162, 286 S.E.2d 276 (1982), holds: "On certiorari, the circuit court is required to make an independent review of both law and fact in order to render judgment as law and justice may require." Syl. pt. 2, *Wysong ex rel. Ramsey v. Walker*, 224 W.Va. 437, 686 S.E.2d 219

<sup>596</sup> *Id.* Syllabus point 5 of *Wolfe v. Forbes* is also Syllabus point 1 in *Far Away Farm*.

<sup>597</sup> Syl. pt. 3, *Jefferson Orchards, Inc. v. Jefferson Cnty. Zoning Bd. of Appeals*, 693 S.E.2d 781 (W. Va. 2010) (citing Syl. pt. 5, *Wolfe v. Forbes*, 217 S.E.2d 899 (1975)).

(2009). *See*, syl. pt. 5, *Humphreys, Adm. v. Monroe County Court*, 90 W.Va. 315, 110 S.E. 701 (1922) (indicating that, upon certiorari from the action of a county court, the circuit court has jurisdiction to hear and determine the matter in controversy, “upon the record made in the county court,” and enter such judgment as the county court should have entered.).<sup>598</sup>

While the court’s previous zoning cases indicated that the circuit court was limited to a limited standard of review, the quoted language in *Harrison* was the justification for the court’s ruling there that the circuit court was not limited to the arbitrary and capricious standard. *Harrison*, in turn, was the basis for the court’s ruling in *Bayer Corp.* that the de novo standard was applicable unless prohibited by statute, but the court didn’t even cite *Bayer Corp* in its discussion of the standard of review applicable in the circuit court.

In *Jefferson Orchards*, the appellant complained that the circuit court used the deferential standard of review in reviewing the decision of the Board of Zoning Appeals because the Board of Zoning Appeals didn’t have jurisdiction to hear the case in the first place; rather, as the court found in *Far Away Farm*, the Jefferson County Planning Commission had the authority to issue or deny the CUP.<sup>599</sup> It wasn’t so much the standard of review that Jefferson Orchards objected to; instead, the objection was that the circuit court deferred to the decision of a tribunal that didn’t have jurisdiction to hear the matter in the first place. Nevertheless, the supreme court agreed that the circuit court used the incorrect standard of review and held that “[i]n the final order of December 30, 2008, the Circuit Court incorrectly set forth a ‘plainly wrong’ standard as a basis upon which to consider the findings of the Board.”<sup>600</sup> Considering that the court cited several of its previous zoning cases that specifically held the plainly wrong standard of review is applicable, considering that the court included syllabus point 5 from *Wolfe* mandating the plainly wrong standard as one of the syllabus points here, and considering the court didn’t specify what the standard of review should have been instead (perhaps because it also held that error was not dispositive)<sup>601</sup> one can not avoid coming away from a reading of this case utterly confused as to the proper standard of review in a zoning appeal before a circuit court. The applicable statute precludes de novo review, but the plainly wrong standard apparently isn’t the right one, either, despite the fact the court cited, apparently with approval, several cases requiring exactly that standard.

Another aspect of *Jefferson Orchards* is troubling. The circuit court, having been ordered to reconsider its decision in the light of *Far Away Farm*, concluded that it too should render a final decision upon the record before it,

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<sup>598</sup> *Id.* at 785–86 (footnote omitted).

<sup>599</sup> *Id.* at 787.

<sup>600</sup> *Id.* at 788.

<sup>601</sup> *Id.*

rather than remand the decision to the Planning Commission that actually had jurisdiction to make a decision on the application for a CUP. Perhaps the supreme court was justified in not remanding the application in *Far Away Farm* to the Planning Commission for a decision, since it found that the applicant “addressed all the unresolved issues at the public hearing and its evidence was unfuted.”<sup>602</sup> In *Jefferson Orchards*, however, the court, after reciting its finding on the sufficiency of the evidence in *Far Away Farm*, observed that “the evidence was in sharp conflict concerning the average density in the vicinity of Jefferson Orchards’ proposed residential subdivision[.]”<sup>603</sup> Only if the de novo standard of review is applicable in the circuit court’s review would it make sense for the circuit court to render the final decision instead of remanding it to the Planning Commission that should have made the decision in the first place. Since the de novo standard is precluded by statute, however, how could it have been proper for the circuit court to have rendered the final decision when the evidence was in “sharp conflict?”

If, as the court has long held, the purpose of the certiorari statutes is to diminish the differences between appeals and reviews in certiorari, and if the separation of powers principle dictates that the judicial branch defer to the proper exercise of the functions of the executive and legislative branches of government, it seems clear that the proper outcome in *Jefferson Orchards* would have been for the court to have remanded the case to the circuit court with directions to remand it to the Planning Commission for its consideration and decision. If that decision were later appealed, the standard of review specified in *Wolfe* and its progeny should be applicable before the circuit court. In fact, the standard of review specified in *Wolfe* and its progeny should be applicable to all reviews in certiorari in circuit court.

## VI. CONCLUSION

All three of the decisions discussed in this article favor the taxing authority at the expense of the taxpayer, and it should now be clear to all that there is no practical avenue of appeal for any taxpayer, large or small, from excessive property tax assessments set by the county assessors or Tax Commissioner. Nor is there any economical way to correct accidental overpayments due even to simple errors if the taxing authority wants to keep the money and elects to contest the issue. As a result of these decisions, Mr. Caryl’s conclusion that “[f]ew arrangements in public administration in West Virginia are less able to measure up to minimal due process legal standards . . . than our current system of property tax assessment review”<sup>604</sup> rings more true today than in 1995.

<sup>602</sup> *Far Away Farm, LLC v. Jefferson County Bd. of Zoning Appeals*, 664 S.E.2d 137, 145 (W. Va. 2008).

<sup>603</sup> *Jefferson Orchards, Inc. v. Jefferson Cnty. Zoning Bd. of Appeals*, 693 S.E.2d 781, 788 (W. Va. 2010).

<sup>604</sup> Caryl, *supra* note 1, at 361.

The West Virginia Supreme Court's ruling in *Foster and Bayer MaterialScience* that a county commission can properly function as both the fiscal agent and budgeting authority for a county and, at the same time, can serve as an impartial adjudicator of a taxpayer's valuation dispute was based on a misreading of the United States Supreme Court's rulings in *Ward* and *Tumey* as reaffirmed in *Caperton*. Likewise, its ruling in *Bayer Corp.* that a circuit court can review de novo a county commission's decision on a taxpayer's request for exoneration was based on a misreading of its own rulings in *North* and *Harrison*. In *Concrete Pipe*, the United States Supreme Court explained that a standard of proof higher than a preponderance of the evidence can itself raise constitutional concerns, especially when the tribunal may not be impartial. Nevertheless, without engaging in the applicable analysis specified by the United States Supreme Court in *Mathews*, the West Virginia Supreme Court found no issue with the imposition of the clear and convincing standard of proof before a county commission, either when the commission sat as a board of equalization and review in the valuation appeals in *Foster and Bayer MaterialScience*, or in hearings before the commission on requests for exoneration in *Bayer Corp.*

The fundamental unfairness of the current property tax appeal procedure system is immediately apparent to any taxpayer who contemplates using it, and it is even more obvious to a corporate taxpayer that does business in other states. Had the West Virginia Supreme Court properly researched the law in other states, it would have discovered that the majority of states have evened the playing field in terms of the standard of proof required to prove the true and actual value of a taxpayer's property, and many have established tribunals that are both impartial and that have the training and expertise to fairly evaluate a taxpayer's claims. While the Legislature made some improvements to the overall process in 2010, it is clear that the counties had enough political clout to protect their unfair advantage, and West Virginia remains numbered among the States with archaic tax laws. While many would argue that it is entirely proper for the court to decline to act as the "principal agent of reform,"<sup>605</sup> few would argue that the citizens of this state have every right to expect the court to correctly interpret and apply existing law and to insure that the government treats its citizens fairly. In that, we are solely disappointed.

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<sup>605</sup> *Id.* at 337.



